

THE BLACKLIST: ARE SMALL BUSINESSES GUILTY UNTIL PROVEN INNOCENT?

HEARING

BEFORE THE

SUBCOMMITTEE ON CONTRACTING AND
WORKFORCE

JOINT WITH THE

SUBCOMMITTEE ON INVESTIGATIONS, OVERSIGHT
AND REGULATIONS

OF THE

COMMITTEE ON SMALL BUSINESS

UNITED STATES

HOUSE OF REPRESENTATIVES

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TUESDAY, SEPTEMBER 29, 2015

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
SUBCOMMITTEE ON CONTRACTING AND WORKFORCE
JOINT WITH THE
SUBCOMMITTEE ON INVESTIGATIONS, OVERSIGHT AND
REGULATIONS
Washington, DC.

The Subcommittees met, pursuant to call, at 10:00 a.m., in Room 2360, Rayburn House Office Building. Hon. Richard Hanna [chairman of the subcommittee on Contracting and the Workforce] presiding.

Present from Subcommittee on Contracting and the Workforce: Representatives Hanna, Takai, Rice, Knight, Bost, and Kelly.

Present from Subcommittee on Investigations, Oversight and Regulations: Representatives Hardy, Adams, and Clarke.

Chairman HANNA. Thank you for being here. I am sorry I am a little bit late, so let us get started. I call this hearing to order.

At a time when small contractors are disappearing from our industrial base—we have lost over 100,000 since 2013—the administration continues to place additional burdens on those that would like to sell their goods and services to the Federal Government. We should be working to expand the universe of contractors, not shrink it. However, I feel the administration's actions will further reduce the number of small contractors that are participating in the federal marketplace.

Since 2009, President Obama has issued 13 executive orders that relate to government contracting, which have resulted in 16 new regulations so far, and there are likely to be more to come. While some of these mandates may be well intentioned, they also have cost, and too often costs significantly outweigh the actual positive effects. In that fact, it is estimated that compliance with government unique regulations cost almost 30 cents of every contract dollar.

Today, we are going to talk about the Executive Order 13673, which the administration has titled Fair Pay and Safe Workplaces. As a former small business owner, I support the idea of fair pay and safe workplaces. I am sure we all do. Companies with labor law violations that affect their performance of contracts should be suspended or debarred; however, the executive order and the resulting proposed legislation and guidance so far go way beyond

that. Instead, it seems to punish companies for unproven allegations. The Department of Labor and Federal Acquisition Regulatory Council have the primary responsibility for implementing Executive Order 13673. So I am glad that we have key officials from both agencies here today. I hope they listen to the small businesses that are testifying and truly consider the significant negative consequences associated with their proposals. There are valid concerns that implementation of this executive order will result in potentially innocent small businesses effectively being blacklisted from participating in government contracting.

I do not believe that the Obama administration would intend this to be the result, but as drafted, implementation of Executive Order 13673 is likely to yield this result. So from my standpoint, this seems to be an executive order in search of a problem, but I am here to listen today to those that would be affected and those that will be implementing this executive order to determine if there is anything that the administration could do to make it more workable.

With that, I yield to Chairman Hardy for his opening remarks. Chairman?

Chairman HARDY. Thank you, Chairman Hanna.

I am please our Subcommittee is holding this hearing to examine the impact of Executive Order 13673 on small businesses. In my opinion, this executive order is just another example of the executive overreach that has become the hallmark of the Obama administration, and it could have a devastating impact on small business and government contractors. I agree that the companies who are considered bad actors in their field should not be rewarded with federal contracts, but there is already a process that allows the Federal Government to weed out these bad actors. Instead of using the existing process, the Obama administration is going to impose significant new burdens on all federal contractors, even though it says that the vast majority of federal contractors play by the rules. Small businesses do not need to be forced to settle unproven claims. They should not be forced to disclose commercially sensitive information to their competitors. And they also should not be forced to report information that the Federal Government already has. Most importantly, they should not be blacklisted from participating in federal contracting based on the accusations that they were ultimately being proven innocent for the past labor law violations in which they have already paid fines or otherwise corrected.

I am particularly concerned that this executive order will lead to fewer small businesses selling goods and services to the Federal Government. We need a healthy industrial base with many small businesses working to provide the government with the innovative goods and cost-effective services. When fewer small businesses compete for federal contracts, the outcome will be less innovation and higher cost to the taxpayer. This is not good for the United States. I cannot help but think the additional mandates that have been piled on to the government contractors by this Obama administration has led some small businesses to leave the marketplace and discourage others from entering it. After all, increasing the costs and complexity of government contracting makes it more difficult

for small businesses to sell goods and services to the Federal Government.

I would like to thank the witnesses for appearing before the Subcommittee today, and I look forward to hearing your concerns of the small government contractors, and I look forward to discussing their concerns with the representatives from the Department of Labor and the Federal Acquisition Regulatory Council. With that I yield back, Mr. Chairman.

Chairman HANNA. Thank you.

Mr. Takai, the ranking member?

Mr. TAKAI. Thank you, Mr. Chairman. Good morning and aloha.

Thank you, Mr. Chairman, for holding this important hearing. Small business participation in the federal marketplaces has always been a priority for this Committee and Congress. When entrepreneurs are able to sell their goods and services to federal agencies there is a win-win situation. Taxpayers receive more bang for their buck with the delivery of quality products and services being supplied by the government. Meanwhile, many small firms are able to grow, confident that they have a client and a partner that will provide them with a steady stream of reliable work.

The federal marketplace continues to constitute a significant portion of the U.S. economy with government spending at 447.6 in fiscal year 2014. In the past, Congress has used its significant financial might to help drive forward a number of policy goals. We passed legislation, for instance, aimed at ensuring small businesses get a fair shot at these projects. Likewise, this Committee has worked in a bipartisan manner to help women and minority-owned businesses navigate the procurement process. The fact of the matter is as a large customer, the Federal Government has the ability to use its buying power to advance priorities important to our nation as a whole.

It is in that context that we must view the president's most recent executive order, which is designed to ensure that firms that contract with the Federal Government understand and comply with laws. We should be clear of the businesses that perform work for the government, the overwhelming majority comply with labor and safety laws and do right by their employees while remaining providing excellent goods and services at competitive prices.

That said, this Committee has heard a number of bad actors who have skirt the law and continue to receive federal contract work. Not only is this bad for workers but it puts honest firms that abide by these rules at a disadvantage. Simply put, federal agencies should not be rewarding companies with a poor labor and safety record with additional opportunities at taxpayer expense. Executive Order 13673 is an attempt to address this challenge by requiring companies to disclose previous labor and safety law violations from the past three years. Even if a contract has such violations on record, firms would only be denied contracts in the most egregious of instances. While this is a reasonable goal, all of us want to see safe workplaces. We must monitor carefully the details of how it is implemented.

There remains a number of thorny technical questions about how this new proposal will impact small businesses. For instance, many small businesses act as subcontractors to larger companies that bid

on federal work. In most cases, the work they do fulfills the majority of the scope of work under the contract. Under this new order, prime contractors would be required to obtain labor law violations certifications from their subs.

There are reasonable concerns that prime contractors may avoid doing work with certain subs all together in the event of any previous problems with labor laws. This raises issues about whether subcontractors should simply certify directly at the agency level. These and other issues will need to be addressed as this Committee examines this executive order. As always, it will be our challenge to balance small businesses' very real concerns against the legitimate needs to protect the public and, in this case, ensure federal dollars are spent in a way that does not harm workers.

I look forward to hearing the witnesses' perspective on these important topics, and I yield back. Thank you, Mr. Chairman.

Chairman HANNA. Thank you.

Ranking Member Adams?

Ms. ADAMS. Thank you, Mr. Chairman.

Each year the Federal Government spends over \$400 billion in taxpayer dollars to provide private companies for goods and services. And while these funds boost the economy and allow firms to hire more employees, we have seen instances in which these same businesses violate safety and wage laws to increase their profits. According to one report, almost half of the total initial penalty dollars assessed for occupational safety and health administration violations in 2012 were against companies holding federal contracts.

Unfortunately, the safety and labor violations do not stop there. Multiple employees at some facilities have sustained injuries and some have even lost their lives. However, rarely were the businesses where these incidents occurred debarred or suspended from the federal marketplace as a result of their unsafe working environments. Labor laws are crucial to a healthy economy. When workers receive their proper wages, they participate in the economy as consumers. Additionally, providing a safe working environment in which injuries are unlikely allows employees to continue working and employers to increase their productivity.

Therefore, to ensure that contractors are adhering to these important laws, President Obama issued the Fair Pay and Safe Workplaces Executive Order last year. The order is intended to increase efficiency and cost savings in the work performed by contractors by ensuring they understand and comply with labor laws. Under the proposed guidance issued to implement the order, contractors who are bidding on contracts valued at over \$500,000 will have to disclose their labor law violations that have occurred within the past three years. Contracting officers, with the help of labor compliance advisors, will then use this information to help determine whether or not a business is responsible. If the regulations fit into the existing procurement process, the contracting officer will just have access to additional information regarding contractors' labor history. Furthermore, the order also provides employees protections to ensure that they receive accurate wages and have the opportunity to litigate certain claims in a court rather than by arbitration.

However, as we hear today, there is some concern that the executive order will be overly burdensome on small businesses. Small

businesses provide quality goods and services at affordable prices, meaning a better deal for the government and the taxpayer. Yet, they have smaller margins and new regulations can be harder for them to absorb. With small businesses creating over two-thirds of new jobs, our economy needs both small businesses and healthy and safe employees to properly operate.

Therefore, in moving forward with the implementation of this executive order, it is important that we find a balance in which small businesses are not overly burdened by complying with the guidelines while still ensuring that contractors who habitually put their employees in harm's way are removed from the contracting process until they have shown progress in correcting their labor law compliance.

And with that, Mr. Chairman, I would like to thank the witnesses for testifying today, and I yield back.

Chairman HANNA. Thank you.

If Committee members have an opening statement prepared, I ask that they submit it for the record.

Just for information—you probably already know this—you have five minutes. When the light goes yellow, you have one, but we will be lenient. So with that, our first witness is the Honorable Angela Styles, who currently serves as chair and partner of Crowell and Moring, and co-chair of the firm's Government Contracts Group in Washington, D.C. From 2001 to 2003, Ms. Styles served as the administrator of the Office of Federal Procurement Policy at the Office of Management and Budget.

Ms. Styles, in the interest of time, you may begin.

STATEMENTS OF ANGELA B. STYLES, CHAIR AND PARTNER, CROWELL AND MORING; THERON M. PEACOCK, P.E., BSCP, SENIOR PRINCIPAL/PRESIDENT, WOODS PEACOCK ENGINEERING CONSULTANTS; DEBBIE NORRIS, VICE PRESIDENT, HUMAN RESOURCES, MERRICK AND COMPANY; WILLIAM J. ALBANESE, SR., GENERAL MANAGER, A&A INDUSTRIAL PIPING, INC.

STATEMENT OF ANGELA B. STYLES

Ms. STYLES. Thank you. Thank you, Chairman Hanna, Chairman Hardy, Congressman Takai, Congresswoman Adams, and members of the Subcommittees. I appreciate the opportunity to appear before you today.

As co-chair of Crowell and Moring's Government Contracts Group, and as former administrator for Federal Procurement Policy at the Office of Management and Budget, I have worked closely with small business contractors throughout my professional career. I am deeply concerned that the executive order will undermine the government's longstanding policy of maximizing contract opportunities for small businesses. If the EO is aimed only at a small number of bad actors, then surely there is a more efficient way to accomplish this goal than imposing requirements that will lead to procurement delays, the blacklisting of ethical companies, and reduced competition in the federal marketplace.

My written testimony today highlights the following five principle concerns. Potentially severe unintended consequences for

small businesses, the high compliance cost that will deter small businesses from participating in the federal marketplace, the diversion of federal employees from assisting and growing our small businesses to collecting data, monitoring compliance, monitoring enforcement of federal and state labor laws with a high risk of de facto debarment of companies, a flawed Regulatory Flexibility Act analysis, and really failure to give even the most basic rationale for the necessity of this rule.

For a more in-depth analysis of many portions of this rule, I refer you to the official comments submitted by the National Association of Manufacturers. They are a client of Crowell and Moring's and I attached it to my written testimony. We really worked for months and months with the National Association of Manufacturers and many companies in industry to really fully understand this rule and the potential impacts of the rule.

But even then you do not consider everything. I was sitting last night thinking about the rule itself and really the hypocrisy of the situation quite striking to me. While on the one hand you have a relatively new OFPP administrator that is issuing commendable and forward-thinking memorandum on efficiency and performance and improvements and cost savings for taxpayers, and on the other hand you have this administration issuing the most bureaucratic, far-reaching, extensive EO and proposed rule that I have seen in my entire career in federal procurement. You cannot have it both ways. You cannot have it both ways. You cannot be efficient while at the same time issuing something that is such a bureaucratic morass for companies, but really particularly for small businesses.

I think for me, a significant and wholly unanswered question is why the Federal Government is creating this burdensome process in the first place. As Chairman Hanna said, this is an EO in search of a problem. Each and every labor law identified in the EO has its own separate penalties for companies who violate the respective laws, and unlike the EO, those labor laws and associated penalties were created by Congress rather than mandated by the executive branch.

The Federal Procurement System also has adequate remedies to prevent companies with unsatisfactory labor records from being awarded federal contracts. Specifically, suspension and debarment officials within every federal agency have broad discretion to exclude companies from federal contracting based upon evidence of any cause—this is a quote—“any cause so serious or compelling in nature that it affects the present responsibility of a government contractor.” To the extent that a contractor's compliance record impacts its present responsibility, FAR subpart 9.4 sets forth proper channels for suspension and debarment proceedings. With established and effective systems in place, it makes no sense to create a new bureaucracy to review these contracts on a contract-by-contract basis with a possibility of astoundingly inconsistent decisions by different agencies and different contracting officers.

Given the scope and complexity, this EO will be impractical, if not impossible, to implement. The substantial cost of compliance imposed on federal contractors will likely lead to higher procurement costs, and I think drive many small businesses out of the federal marketplace all together. These costs will be borne disproportion-

tionately by companies who can least afford them, our small businesses. This is an entirely unacceptable outcome. The goals of the EO are targeting contractors with the most egregious violations, but it could be accomplished with the enforcement of existing labor laws and our existing suspension and debarment system.

This concludes my prepared remarks but I am happy to answer any questions.

Chairman HANNA. Thank you.

Our next witness, Theron Peacock, the senior principal and president of Woods Peacock Engineering Consultants, a service-disabled veteran-owned small business with 16 employees located in Alexandria, Virginia. Mr. Peacock has 38 years of experience and co-founder. His present business after 22 years at three other firms. He is here testifying on behalf of the American Council of Engineering Companies.

Mr. Peacock?

STATEMENT OF THERON M. PEACOCK

Mr. PEACOCK. Thank you, Mr. Hanna.

Subcommittee Chairman Hanna, Hardy, Ranking Members Takai and Adams, and members of the Committee, I appreciate the opportunity to testify before you today about the issues surrounding the Fair Pay and Safe Workplace Executive Order. My name is Theron Peacock. I am a senior principal and the president of Woods Peacock Engineering Consultants located in Alexandria, Virginia, and we have 16 employees.

Woods Peacock is a service-disabled, veteran-owned small business that focuses on service to a very broad range of federal agencies. My firm is an active member of the American Council of Engineering Companies, the voice of America's engineering industry. ACEC's over 5,000 member firms represent hundreds of thousands of engineers and other specialists throughout the country. They are engaged in a wide range of engineering works that propel the nation's economy and enhance and safeguard America's quality of life. Almost 85 percent of our firms are small businesses.

First, ACEC appreciate the Labor Department and the FAR Council's efforts to improve labor compliance practices with federal contracts. However, as Chairmen Chaffetz and Kline have noted, this guidance is fixing a problem that does not exist. The Council is concerned that the guidance will make compliance so difficult that it will drive a significant amount of private industry, both large and particularly small business, from the federal market.

There are three broad issues with the guidance that the Department of Labor and the FAR Council released this past May. First, the reporting is burdensome and duplicative. Under the guidance there are 14 federal laws and executive orders that implicate the law. Are you aware that much of the reporting data that is requested is already reported to a variety of federal agencies? For example, annual compliance reports are required for EEOC, OSHA, and the Rehabilitation Act, and Davis-Bacon requires weekly reporting. Additionally, all federal contractors are required to file annual reports in SAM. Why add another report when the data has already been received?

Let me just give you an example. As a subconsultant, we have contracts with over 30 prime AEs. If we need to submit these reports to all 30 primes, who in turn submit the information to the government, you will be getting the very same information multiple times and putting it in the same database. When you consider that each prime needs to have multiple firms under their contracts, this accumulates into a very significant duplication of record that will do nothing more than create confusion.

Second, these regulations will significantly complicate the relationship between primes and subcontractors and will likely result in the development of a blacklist for subcontractors, significantly reducing the number that will qualify to do federal work. Under the guidance at the time of execution, contractors must require subcontractors to disclose any administrative merit determinations or other complaints within the preceding three years. This will force the contractors to bar any subcontractor that is stuck in any judicial process. In engineering, roughly 50 percent of prime engineering work is subcontracted. Primes and subcontractors switch positions frequently. By requiring primes and subs to share confidential business information, they are sharing information that can damage your ability to compete against each other in the future.

Third, there are due process implications with these regulations. Under the guidance, claims that have not been decided or even heard by a judge will obligate the firm to make a report. This will allow for claims that will not have had the benefit of a third-party hearing of the dispute to potentially place the firm in positions to lose their business. It also places the contracting officer in an untenable position. Under the guidance, the labor advisor has three days to decide on the outcome of a report. If the labor advisor does not submit a report, then the contracting officer will have to make the decision regarding a firm's labor compliance. The contracting officer will become the judge in a complaint, and they are not qualified to do that. Given the risk adverse nature of contracting, this requirement will force the contracting officer to disqualify the firm or subcontractor so that they are not subject to the risk of censure.

ACEC asked the Committee to work with Labor and the FAR Council on redrafting the rule to make sure that construction services can succeed in the federal marketplace. These regulations have the potential to unfairly prohibit my firm and many of ACEC's member firms from participating in these opportunities.

Thank you for the opportunity to participate in today's hearing, and I would be happy to respond to any questions from the Committee members.

Chairman HANNA. Thank you.

Our third witness is Ms. Debbie Norris, who served as vice president of Human Resources for Merrick and Company, a federal contractor based in Greenwood Village, Colorado, which is located just outside of Denver.

Ms. Norris, you may begin.

STATEMENT OF DEBBIE NORRIS

Ms. NORRIS. Chairman Hanna and Hardy, Ranking Members Adams and Takai, and distinguished members of the Subcommittee

tees, my name is Debbie Norris, and I am vice president of Human Resources at Merrick and Company, a small business federal contractor located in Colorado. I appear before you today on behalf of the Society for Human Resource Management (SHRM). Thank you for the opportunity to testify today on my experience as a representative of small business competing for and managing federal contracts.

Mr. Chairman, first, let me make clear that the president's goal of providing fair pay and a safe workplace is a shared goal. After all, who would not be for that? In fact, I work to provide a safe workplace and to help make Merrick an employer of choice, not just because it is the right thing to do but because it provides us a competitive advantage in our industry. Unfortunately, this order as written is unworkable and should be withdrawn.

In Fiscal Year 2014, my company, Merrick, managed 329 federal contracts, some of which we were prime and some of which we were sub, for the Department of Defense, Department of Energy, NNSA, National Science Foundation, among many others. We have been recognized as a best company to work for in Colorado on five different occasions. Our internship program has been recognized as a best practice in the Denver Metro area. And I mention these awards because despite the fact that my company invests significant time and resources on compliance and creating a sought after work environment, we believe the FAR Council regulations and the DOL guidance to implement the Fair Pay and Safe Workplace executive order will have a significant and negative impact on our ability to maintain current contracts, compete for new ones, as well as attract employees.

In my testimony today, I will address some of the key concerns small businesses have with this proposal. First, I am really concerned about requirements to report nonfinal agency actions. In my experience, it is not uncommon for companies to undergo agency investigations and even be issued a notice of a violation that turns out to be unfounded. If nonfinal agency actions are considered, companies like mine could lose a contract as a result of cases or investigations that are not yet final or eventually dismissed.

I would like to offer one example. As a federal contractor, Merrick is audited by the OFCCP on a periodic basis. Our current audit started in September 2014, and we still have not received a determination from the OFCCP. Not very timely.

We are concerned that unresolved actions like this will have a negative impact on our ability to compete for future federal contracts. In addition, federal contractors will feel pressured to settle a claim or enter into a labor compliance agreement with a federal agency even if they feel they have done nothing wrong.

Second, I am very concerned by DOL's proposal to create powerful new positions called Agency Labor Compliance Advisors. These advisors insert themselves into an existing relationship between contractors and contracting officers to provide guidance on assessing the seriousness of reported violations. Due to the ambiguity of definitions in the guidance, inappropriately broad discretion is given to these advisors.

Third, I am also concerned about the recordkeeping and ongoing reporting burdens placed on small businesses. Collecting and re-

porting on information deemed a labor violation under 14 different laws and unnamed number of state laws will not be an easy task. Doing so will require contractors to create a company-wide, centralized electronic record of federal and eventually state violations over the past three years.

Merrick has 18 different offices in eight states, as well as offices in Mexico and Canada. This proposal places an additional burden at headquarters of ensuring that each office is regularly and accurately reporting this information to us. When staff time is directed to responding to compliance requirements, it takes away from the HR department's focus on the needs of our employees and meeting our business and clients' objectives.

Contractors will likely handle this situation in one of two ways—they either will try to make due with existing staff, which may result in a failure to meet the contracting obligations, or they will hire additional staff, which will end up costing the government more. And a third reason is they may actually just exit the federal market.

Fourth, this information is already collected. As a contractor, we already report this information to the government and they should use the data it already collects.

In closing, SHRM believes that the proposals create an unworkable system that will cause harm to the federal contracting process and impose requirements on contractors and subcontractors that are impractical and hugely expensive, especially for smaller business.

Mr. Chairman, thank you again for allowing me to share SHRM's views on the FAR Council and DOL proposals. I welcome your questions.

Chairman HANNA. Thank you very much.

I now yield to Ranking Member Adams for the introduction of our final witness.

Ms. ADAMS. Thank you, Mr. Chair.

It is my pleasure to introduce Mr. William Albanese. Mr. Albanese is the general manager of A&A Industrial Piping in Fairfield, New Jersey, a business with over 20 years of experience. Mr. Albanese is testifying today on behalf of the Campaign for Quality Construction. The campaign represents six specialty construction employer associations that have over 20,000 members, the vast majority of which are small businesses. These members perform construction projects in the public and private construction market as prime contractors and subcontractors.

Welcome, Mr. Albanese.

STATEMENT OF WILLIAM J. ALBANESE, SR

Mr. ALBANESE. Thank you. Good morning, Chairman Hanna, Chairman Hardy, Ranking Member—I thought I get an extra couple minutes.

Good morning, Chairman Hanna, Hardy, Ranking Members Takai and Adams. Thank you for the opportunity to testify in support of the goals of President Obama's Fair Pay and Safe Workplaces Executive Order.

I would like to state upfront that we support the goals of the executive order and believe that if it is implemented carefully so that

the Labor Department is able to evaluate the responsibility of prime contractors and subcontractors alike, as to their legal compliance, it will help achieve the goal of encouraging law-abiding companies of all sizes to be able to compete on a level playing field for government contractors.

The Campaign for Quality Construction Groups are the leading specialty construction groups representing the subcontracting component of the construction industry, which comprises nearly 65 percent of the construction industry. That is by the Bureau of Labor Statistics and Employment Data. It is 20,000 members strong. We are the lion's share of the industry. General contractors, construction managers, and heavy construction firms make up the far lesser share of total employment.

It must be stressed for the purposes of this hearing that the vast majority of all construction work on building projects of significant scope is performed by subcontractors. Also, our member companies have a balanced perspective of federal procurement issues. As we typically perform public works projects as either subcontractors or prime contractors, our views are multidimensional. Likewise, our position benefits both small businesses and large business competitors in the federal market.

Competitive bidding and project performance are both greatly improved when marginal performances are discouraged from corrupting fair competition in the market, and quality firms can compete without being undercut by nonresponsible contractors. Agencies and taxpayers are the beneficiary of these improved conditions.

So now just a little about me to lay the groundwork for the summary of our written statement. I have been in the construction industry all of my adult life. I started out completing a five-year, federally-approved apprenticeship program. That was a long time ago. I served the A&A group over 25 years ago. During that period, I served as the president of the New Jersey Mechanical Contractors. I currently serve as a member of the New Jersey Economic Development Authority. I chaired the New Jersey Mechanical Contractors Industry Fund. I served as a trustee of the Union Pension and Welfare Fund, along with chairing the MCAA Legislative Committee.

When A&A started with a good deal of hard work and some luck, we graduated to a firm with an annual value of about 25 million today with our full-service mechanical contracting, HVA service business, and a separate construction management division. A&A has performed many direct federal, as well as state and local public construction jobs on the East Coast at all contracting levels. We are the mechanical prime on a \$4 billion World Trade Center project. Our contract is 60 million on that project. We were also the mechanical prime on a Dulles Carter Metro Rail Project and project at the New Jersey Picatinny Arsenal, just to name a few of the direct federal grant projects.

We are also agency construction managers for public entities—municipalities, community colleges, New Jersey school projects, county projects, and we also are administering three projects for FEMA. So we bring the general contractor construction management perspective to these issues also.

We also perform mechanical contracting work for a number of private owners, including Merck, Stepan Chemical, and other pharmaceutical firms, and public agencies, including the New Jersey DPMC, Port Authority New York/New Jersey, New Jersey Transit. We have a broad perspective of accepted industry standards for the strict and comprehensive qualification requirements in the private and public sector, and that should be germane to the Committee's deliberation on this issue today.

So our balanced perspective on the executive order is as follow: We support the overall goals of the order—more careful screening of prospective federal prime contractors in order to improve competitive conditions and improve federal construction project performance. Best practices in the private sector prove that more time and effort invested on project screening and planning upfront pays off in improved project performance. Substantially poor legal compliance records may well be the leading indicator of overall poor business practices and increased project nonconformance.

In my experience, those who cut corners on law and safety usually are the ones who are cutting corners on contracting requirements. We need a level playing field. If the executive order discourages marginal performance from entering the market, fair competition standards will be improved. And then top quality firms will re-enter the market.

Second, the provisions of the executive order seeking to stem work on misclassification are entirely laudable. Rapid misclassification of employees as independent contractors is the scourge of fair competition in construction and leads to other abuse of public laws in both public and private sector.

Chairman HANNA. Mr. Albanese, if you could—you are over your time, but please continue.

Mr. ALBANESE. Oh, I am sorry.

Chairman HANNA. If you could wrap it up.

Mr. ALBANESE. Let me wrap it up.

Chairman HANNA. If possible.

Mr. ALBANESE. So to conclude, allow me to respectfully dissent from the title of the hearing. It is neither blacklisting nor adverse to the best interest of legally compliant small businesses or any other businesses.

So Co-Chairmen Hanna, Hardy, Ranking Members Takai and Adams, and the Committee members, thank you for this opportunity. That concludes my remarks, and I look forward to your questions.

Chairman HANNA. Thank you.

Mr. ALBANESE. Thank you.

Chairman HANNA. Mr. Albanese, I have not heard anyone here disagree with you in terms of the goal. What I have heard, and feel free to correct me, is that this is a very subjective, has the potential to be extremely arbitrary and capricious, that the people who are asked to do this work are neither judges nor juries, that the difficulty associated with outcomes with this is that people are essentially convicted before they are proven innocent, that any disgruntled other contractor, someone in your business could register a complaint with you—about you, have that hanging over your head, and it is up to you to figure out how to get rid of it. So I

do not think there is anybody here that argues that people who are bad actors, who are appropriately litigated in that regard are at issue.

But with that, Ms. Styles, would you like to respond?

Ms. STYLES. I think that is exactly the problem. I mean, there are adequate remedies already. And if people do not think that the remedies are adequate in terms of what Congress decided for the labor laws or how the suspension and debarment system is working, then that is where we should focus on fixing this. If those are the goals, you already have too many legal remedies under labor law and the suspension and debarment system to really get it right, to make sure that bad actors are not participating in the federal procurement system.

Chairman HANNA. Okay. So what is driving his?

Ms. STYLES. Why, I assume it is labor interests. I assume that there are other reasons behind this.

Chairman HANNA. So what would—I mean, if you feel comfortable saying so, what do you mean by that?

Ms. STYLES. Well, I mean, my presumption is, in part, that many would prefer that these jobs be done by federal employees. Many would prefer that private companies with labor unions make sure that private companies that do not have labor unions are not benefitted by particular labor laws. I also think it is an effort to have a mechanism. For example, the term “compliance agreement.” You will not find the term “compliance agreement” in any statute or regulation except for this proposed rule. If you ask me, it is a way to extort settlements out of companies on a case-by-case basis where the Department of Labor wants—

Chairman HANNA. Well, there is an insidious nature to all of this.

Ms. STYLES. Well, it is certainly—I cannot come up with an objective rational explanation.

Chairman HANNA. Mr. Peacock, would you like to respond?

Mr. PEACOCK. This is a little difficult as a small business because, first of all, in the AE industry, we are selected based upon—I am sure you are familiar with the Brooks Act. We are selected based upon our qualifications. So it does not make—we are not going to succeed in a business if we do not have high-quality people, if we are mistreating our people. I cannot hire good quality people by not paying them a fair wage, by not giving them good benefits, and by mistreating them. They are professionals. They are going to go someplace else.

Chairman HANNA. In your statement you mention that. Most of this is an anathema to what you would do to run a normal business that is successful, like your business, Ms. Norris.

Mr. PEACOCK. Absolutely. I have to, you know, when we are selected based upon qualifications, I have to compete with a large number of my fellow firms. And in order to do that, I have to be able to prove that I am better than they are. That I have more experience. That I am better qualified. That I have the integrity and the experience to do the project.

Chairman HANNA. You are okay with the punishment; you just do not like the lack of due process?

Mr. PEACOCK. Absolutely.

Chairman HANNA. Ms. Norris?

Ms. NORRIS. I fully support what Ms. Styles and Mr. Peacock have said. We do work hard to make our company a place that people want to come to work. And if I did not pay a fair wage, if I did not follow safety requirements—we have a huge safety culture in our company. Every meeting starts with a safety moment. So we do all the things. And again, we do not have any violations right now that we could even talk about. It is that potential of how much it is going to cost us to maintain the records for that, the things that we have to create, because there is nothing in place to track all that. It is just—it does not make sense.

Chairman HANNA. Thank you.

I yield to Ranking Member Takai.

Mr. TAKAI. Thank you, Mr. Chairman.

First question to Mr. Albanese. There are those that argue that discretion is already given to agency officials to seek out labor law violations before an award of a contract. In your experience, how often are contracting officers asking for this type of information?

Mr. ALBANESE. In my experience working, as I said, for private agencies, private companies, contractor prequalification is mandated. It is commonly done. New York City has VENDEX. The State of New Jersey has DPMC. Port Authority not only has a very strict qualification requirement but they have an integrity monitor that is on the job. This is common business sense. In other words, it makes good business sense to vet the contractor before he gets the job. It is common in our industry. We do it all the time, and we do not see it as being a burden to any legitimate, fair contractor that is playing by the rules. It is done all the time.

Mr. TAKAI. My question though is how often are the contracting officers asking for this type of information?

Mr. ALBANESE. Specific contracting officers? When we did the Dulles job, we did not have very much vetting at all. We were just awarded the contract.

Mr. TAKAI. Right. So my follow up then is how effective can this discretion given to contracting officers be if it is rarely utilized to search for violations defined in the executive order?

Mr. ALBANESE. This executive order will mandate a fair level playing field for everybody is involved. That is what this will do. And there will not be the gap. They give this guy the job. Let us not check if he has labor violations, or he does not have labor violations, or he violated Davis-Bacon, or he has safety issues that were never investigated.

Mr. TAKAI. Okay. So you are advocating that all subcontractors' responsibility determinations be made by the agency. What are your concerns with the prime contractor making these determinations?

Mr. ALBANESE. Well, some of the regulations are so hyper technical. On the basis of that, I do not think as a prime contractor, if I was the prime, because we are primes many times, that we want to get into this hyper technical evaluation. We feel it would be much better if it would be done by a government agency, a CO, an LCA, to do that process for us. FAR right now does have some regulations that are moving in that direction. That would be a great thing to do.

Mr. TAKAI. Okay. Thank you.

Mr. Peacock, you have addressed concerns regarding the disclosure of your violation to primes, contending that this could harm your business relationships, and in some instances, eliminate the competitive advantage. However, could not some of these concerns be alleviated if the subcontractors went to the Department of Labor for the determination as this guidance allows?

Mr. PEACOCK. Well, I believe what you are asking is should we be dealing directly with the Department of Labor on these issues as opposed to running it through our competitors. And one of our concerns is that sharing a lot of our business information with our competitors certainly does put us at a disadvantage. When we have to compete for particularly personnel, highly qualified personnel, there is a shortage of good quality engineers out there. And to keep those people, it is very important for us to treat them fairly and be able to maintain those. And so for us to go—if you want me to deal—I would much rather deal with the Labor Department. My analogy is if we—most of us have security clearances. I deal with the Department—the Security Department if there is an issue. If I have an employee who has an issue, I deal directly with them. They tell me I have to report to them and they tell me what I have to do as the facility security officer. It should actually be the same thing. If I have something going on in my company, then I should be dealing directly with the Labor Department and solve that problem and not passing it through a million different people.

Mr. TAKAI. Okay. Great. Thank you.

I yield back.

Chairman HANNA. Mr. Hardy?

Chairman HARDY. Thank you, Mr. Chairman.

Ms. Styles, do you think it is realistic to expect the labor compliance officers to have the expertise on 14 different federal labor laws and numerous state requirements and laws? Do you think people have that expertise or could afford that in small business?

Ms. STYLES. I think it is impossible. I mean, we cannot even write my testimony with just me because it takes a government contractors lawyer and a labor lawyer. I do not know how one person or even one set of people can really get a handle on all those laws and how they operate.

Chairman HARDY. Does anybody else care to add to that in any way, shape, or form?

Go ahead, Mr. Peacock.

Mr. PEACOCK. Well, I would like to comment.

Chairman HARDY. Yes, go ahead.

Mr. PEACOCK. The issue of complying with this, in looking at the prequalification forms that I fill out, it would take 10 or 15 minutes of looking at the prequalification form to see that there are questions such as have you had OSHA violations? Have you had Davis-Bacon violations? Do you have any criminal action or civil action going on? Your financial status. Do you owe so much money? These are common, basic items that are listed in the prequalification. It would be easy to vet on those specific issues. That would raise the flag, and then you could go into a deeper analysis of it.

Chairman HARDY. Last year there were over 77,000 pages of new administrative laws placed out; 3,280 some-odd new regulations. How many of those do you understand today—have you read, your company read, and understand today?

Mr. PEACOCK. Honestly, probably zero.

Chairman HARDY. Okay. So with these compliance laws, do you believe that you can still keep up with that regular order?

I will move on here. Mr. Peacock, let us talk compliance for a second. They say what it will take to implement this is probably only about eight hours in the FAR Council, and the DOSL estimated it will only take eight hours to figure these rules out. Is that correct?

Mr. PEACOCK. Well, we currently have 24 IDIQ contracts, and estimate at least another 16 single scope contracts. That is 40 contracts. And if I take—sorry, I am an engineer—if I take 40 and I divided it by eight hours, that gives me 12 minutes to deal with each one of those contracts, compliance with each one of those contracts. Now, personal opinion is I am going to, because I am a subcontractor, I am going to get an email from my point of contact of the prime. They are going to say, “Can you please submit this information to us?” Realize that not all of these are going to occur at the same time. They are going to occur on the anniversary date of the contract, and every six months after that as it is currently proposed as I understand it, I am going to get an email. I have to respond to the email. I have to get my administrative people to pull the information, put it together. I have to respond back in an email, and then I am going to get a telephone call saying, “Oh, could you give me this in a different format?” You know, that is just the way it goes. I cannot do all that in 12 minutes. And my estimation is that it is going to take me two hours at the minimum to deal with each one of those. That gives me 80 hours on 40 contracts, and I have got to do this twice a year? I mean, that eight hour estimation is way, way underestimated. And it is going to vary for every company, depending on the number of contracts you have.

Chairman HARDY. Ms. Styles, another quick question. As a contractor, I have been a prime myself for a number of jobs, and with that, usually, typically sometimes there is upwards of 30 or 40 subs of some kind on major projects. And through that process should I be required—how can I follow up with all my subs to make sure that they are in compliance, and any guestimation what would happen if I am awarded a contract and I find out that somebody all of a sudden becomes under violation? Any estimation what might happen there?

Ms. STYLES. Well, it also requires the prime contractors to become experts on all of these laws and all of these regulations, and the mitigating circumstances and what should be done to be compliant by all of the subcontractors that they have. I mean, even small businesses, and many small businesses are prime contractors, they will have large business subcontractors. They will have the largest defense contractors in our country—the Lockheed Martins, the UTCs, the Boeings will be their subcontractors. So you are going to have this small business asking Boeing for all of their labor compliance information. And then that small business has to

assess that and has to decide whether they are really compliant or not. I do not know how they do that.

Chairman HARDY. Thank you, Mr. Chairman. I yield back.

Chairman HANNA. Ms. Adams?

Ms. ADAMS. Thank you, Mr. Chairman.

Ms. Norris, you indicated in your testimony that the disclosures required in the executive order are duplicative as they are collected by different agencies already. However, state violations are not reported and the contracting officers at the various agencies do not have access to the information at issue. So how would you recommend making these disclosures available to the contracting officer, if not through the method proposed through the guidance?

Ms. NORRIS. Well, first off, we do not know what state laws are going to be required. That has not been spelled out. So that is a little bit difficult to answer. Let me regroup here. Because the proposal process asks for this information, it seems to me that it is already being asked for and that it seems redundant to have a whole executive order to handle a process that is already part of the FAR proposal process. And so I do not know how you would tell the state, other than through the current process where you list what has been a violation on the current proposal process. I am sorry, that is not part that I am familiar with on the state side.

Ms. ADAMS. Ms. Styles, would you like to comment? I think you also mentioned the duplicative. I believe I heard you say that.

Ms. STYLES. I did mention the duplicative piece of it but we cannot say anything about the state piece because they have not implemented it yet. But the duplication issue is to avoid de facto debarment of a particular company. So what is happening is that for each contract over \$500,000 and each subcontract over \$5,000, the contracting officer has to receive all of the information about the violations, including the mitigating circumstances and evaluate it. And then the guy next door or at the next agency. So maybe it is a contracting officer at DoD. The contracting officer at VA has to look at all of that information again and make their own independent determination as well. And so even if it is two contracting officers sitting next to each other in DoD, they cannot talk to each other about it. They have to make their own independent determination. And so it is really duplicative collection of exactly the same information for a prime contractor and exactly the same information for subcontractors as well. So there is a reason for it, because they want to avoid de facto debarment of contractors and subcontractors, but it is a huge collection of information over and over—the same information over and over and over again.

Ms. ADAMS. All right. I have another question. The goal of the executive order is to ensure that the government is not put at risk as a result of awarding contracts to those who did not comply with labor laws. Mr. Albanese, do you know if instances in your business history where marginal performers undercut more responsible bidders and the public agency ended up with a bad project as a result?

Mr. ALBANESE. The interesting part about that on say public agency jobs that we do, all the contractors have gone through this vetting process. We know that their financial backgrounds support it. As an example, on the state work, you are allowed, you are getting an amount of money that you can bid up to or have an aggre-

gate of work in place. So my experience is that rarely do we see violations or these violators doing work and getting away with it because they have already been vetted.

Ms. ADAMS. Okay. Follow-up, Mr. Albanese. Is it not just good business practice to keep track of the information required in the executive order?

Mr. ALBANESE. It makes absolute perfect business sense to vet a contractor before you are going to give him a \$5 million job to make sure—and the list goes on in my prequalification list. There is no criminal, there is no civil violations, there is no OSHA violations. That this contractor has paid Davis-Bacon accurately, and he is not skirting the issues. It makes perfect business sense.

Ms. ADAMS. Thank you, sir.

Mr. Chair, I yield back.

Chairman HANNA. Mr. Rice?

Mr. RICE. Thank you, Mr. Chairman.

I kind of want to step back and look at this from an even bigger picture because I think this particular executive order is just a symptom of a larger problem that this country faces. Here we sit seven years after the Great Recession and our economy continues to struggle. We vacillate between zero or negative growth and 2 percent growth, where most economists think we should have had a significant snapback by now. And I think one of the big problems that is holding our economy back is this vast mushrooming regulatory burden that all you guys face.

So the SBA estimates that the cost of federal regulation on a firm with fewer than 20 employees is \$10,585 per employee per year. The president apparently agrees with me. He constantly says we must reduce and streamline regulations on small business. But do not be fooled by what he says; look at what he actually does. According to a recent study by the Mercado Center, this administration has issued 120,000 new regulations. They claim the prize. They have issued more regulations than any administration since Linden Johnson. And not only that, they have done it in six years instead of eight. We still have two more years to go. So when you look at what he says—we need to reduce regulation—what he actually does, adding all this regulatory burden like this proposed executive order, we should not be surprised when the economy is stifled.

Right now, for the first time in 80 years, we have had five consecutive years where more businesses are dissolved in America than are formed in America. The first time since the Great Depression. More Americans have left the workforce than at any time in the last 35 years. Homeownership in America is as low as it has been in 50 years. I do not think any of this is coincidental. I think it is all a direct result of the mushrooming regulatory burden that we place on small business.

So I have a question for you all. You guys are in the regulatory business or in small businesses. Can you name for me—let me ask you this. Ms. Styles, do your clients see a streamlined and reduced regulatory burden under this administration?

Ms. STYLES. No, they do not.

Mr. RICE. Okay. I have to go quick.

Mr. Peacock?

Mr. PEACOCK. No, sir. Not at all. We are drowning in paper-work.

Mr. RICE. Okay, thank you. Thank you.

Ms. Norris?

Ms. NORRIS. No, we do not.

Mr. RICE. Mr. Albanese?

Mr. ALBANESE. No, I do not.

Mr. RICE. Okay, thank you.

Ms. Styles, can you name for me one instance where this administration has generated a streamlined or reduced regulatory burden? I am not talking about a minor thing. I am talking about any meaningful reduction in cost or time on small business?

Ms. STYLES. Well, I will say that Ms. Rung, who is testifying after me, did issue a memorandum on efficiency on December 14th of last year. So to the extent that that is actually implemented—but I do not see how you implement it—

Mr. RICE. So have your clients seen any benefit yet from any streamlined or reduced—I am talking about material change?

Ms. STYLES. No.

Mr. RICE. Mr. Peacock?

Mr. PEACOCK. No.

Mr. RICE. Ms. Norris?

Ms. NORRIS. No.

Mr. RICE. Mr. Albanese?

Mr. ALBANESE. No, to that question.

Mr. RICE. So somehow the rhetoric does not match what we are actually doing here. I think that, you know, it goes back to the book, *The Death of Common Sense*. We are drowning in regulation. If we do not get a hold of this, I think our economy will continue to suffer. I think it bodes very poorly for this next generation coming up in America. When you ask Americans, do you think that your children have a brighter future than you did, and two-thirds of them say no, that bodes badly for this country. And I think this is one of the underlying foundational reasons why Americans feel this way.

I yield back.

Chairman HANNA. I want to thank you all for being here today.

And for the record, I have 35 years in the Operating Engineers Union. I support Davis-Bacon. I get it. But it seems to me that there really is a lot of rules and regulations that may even be unconstitutional since the regulation was not—which we will get into in the next hearing, but the whole idea of a lack of due process and the subjective nature that is given to a guy whose job it is to manage a project, a contracting officer, my biggest concern is that it is a race to defend and protect the behind of that particular person who has an incentive necessarily to race to the bottom, but yet at the same time, if that person is not thoroughly qualified or in any way not open minded about the people who have been low bidder, then he has an opportunity to find virtually any reason he likes, or she likes, to put at risk a company that has been years in business, does great work, may have made a mistake or two in their lives—and we all do—and summarily, execute them from a particular job without any formal process.

So with that I want to thank you all for being here. We are going to go to the next panel. And Mr. Hardy will be taking the chair. Thank you.

Chairman HARDY. Good morning. We will start with a quick introduction. I guess I better start the meeting. Thank you for being here.

I would just like to start with a quick introduction to our panelists. First, we have Ms. Anne Rung. She is our first witness on the panel. She is the administrator of the Office of Federal Procurement and Policy Office of Management and Budget. Our second witness is Mr. Lafe Solomon. He serves as the senior labor compliance advisor in the Office of the Solicitor at the United States Department of Labor.

So with that, Ms. Rung, we will let you have five minutes.

**STATEMENTS OF ANNE RUNG, ADMINISTRATOR, OFFICE OF
FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGE-
MENT AND BUDGET; LAFE SOLOMON, SENIOR LABOR COM-
PLIANCE ADVISOR, OFFICE OF THE SOLICITOR, UNITED
STATES DEPARTMENT OF LABOR**

STATEMENT OF ANNE RUNG

Ms. RUNG. Chairman Hanna, Ranking Member Takai, Chairman Hardy, and Ranking Member Adams, and members of the Subcommittees, thank you for the opportunity to appear before you today to discuss the administration's implementation of Executive Order 13673, Fair Pay and Safe Workplaces. My comments today will primarily focus on actions being taken by the Federal Acquisition Regulatory Council, the FAR Council, which I chair as administrator of the Office of Federal Procurement Policy (OFPP).

It is important to emphasize at the outset that OFPP and the FAR Council have been working in close partnership with the Department of Labor on rules and guidance to implement this executive order. Our respective organizations are fully committed to implementing the EO in a clear, fair, and effective manner, and have been actively seeking feedback from stakeholders since issuance of the EO more than a year ago. We did this to ensure that we had sufficient information and insight from stakeholders, including small businesses, to achieve these goals.

This EO is designed to improve contractor compliance with labor laws in order to increase economy and efficiency in federal contracting. As Section 1 of the EO explains, contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and deliver goods and services to the Federal Government in a timely and predictable and satisfactory fashion.

While the vast majority of federal contractors abide by labor laws, studies conducted by the General Accountability Office, the Senate Health Education Labor and Pension Committee, and others, suggest that a significant percentage of the most egregious labor violations identified in recent years have been by companies that receive federal contracts. In addition, studies performed by others have found a nexus between companies with labor violations and significant performance problems on government contracts.

As explained in the preamble to the proposed FAR rule and in my written statement, we have taken a number of steps in the proposed rule consistent with direction in the EO to minimize the implementation burden for contractors and subcontractors, including small businesses. Let me just provide you with a few examples.

One, the proposed prior rule builds on existing processes and principles, including the longstanding requirement that a prospective contractor be a responsible source. Two, many of the contracts performed by small businesses, including contracts valued at \$500,000 or less and subcontracts for commercial off-the-shelf items, are exempt from the proposed FAR rules disclosure requirements.

Further, during listening sessions held by DOL, OMB, and relevant councils, stakeholders raised concerns regarding the potential complexity and burden associated with two aspects of the EO in particular. One, provisions addressing disclosure of violations of equivalent state laws; and two, provisions addressing disclosure and evaluation of subcontractor violations.

In response to what we learned from these sessions, requirements in the EO addressing the disclosure of violations of equivalent state laws, with the exception of OSHA state plans, will be phrased in at a later date. In addition, the FAR Council has developed alternative proposals that seek to address concerns at HERD regarding the challenges contractors might face in evaluating violations disclosed by their subcontractors. This includes a possible phase-in of subcontractor disclosure requirements, and the proposed FAR rule has invited public comment on additional or alternative approaches to this issue.

Stakeholder feedback has been a very key component in the development of the proposed FAR rule, and currently, the FAR Council is carefully reviewing the many and diverse public comments received in response to the proposed rule published at the end of May to determine where additional revisions are needed. In considering comments, the FAR Council seeks to ensure that the final rule is both manageable and impactful in achieving the EO's objective of bringing contractors with significant labor violations into compliance with the law in a timely manner. Without question, implementation of the EO requires the government's policy, operational, and technology officials to address a number of difficult issues head on, and it is hard work, but work that is critical to the integrity of our procurement system, ensuring economy and efficiency in contracting and security the well-being of American workers.

Thank you, and I am happy to answer any questions you may have.

Chairman HARDY. Thank you, Ms. Rung.

I would like to turn the time over to Mr. Solomon for five minutes.

STATEMENT OF LAFE SOLOMON

Mr. SOLOMON. Good morning, Chairman Hardy and Hanna, and Ranking Members Adams and Takai. Thank you for the invitation to appear before your Subcommittees to speak about DOL's proposed guidance to implement the Fair Pay and Safe Workplaces Executive Order.

For the past year, I have led the efforts at DOL to implement this EO. Although most federal contractors comply with applicable laws and provide high-quality goods and services to the government and taxpayers, a small number of federal contractors have committed a significant number of labor law violations in the last decade. Those contractors who invest in their workers' safety and maintain a fair and equitable workplace should not have to compete with contractors who offer lower bids based on savings from skirting labor laws.

To address this issue, President Obama signed this EO last year requiring prospective federal contractors on covered contracts to disclose certain labor law violations, and giving agencies guidance on how to consider those labor violations when awarding federal contracts. With this EO, the president pledged to hold accountable federal contractors to put workers' safety, hard-earned wages, and basic workplace rights at risk.

The EO builds on the existing procurement system and changes required by the EO fit into established contracting practices that are familiar to both procurement officials and the contracting community. In addition, DOL will provide support directly to contractors so that they understand their obligations under the EO and can come into compliance with federal labor laws without holding up their proposals in response to specific federal contracting opportunities. Finally, DOL will work with labor compliance advisors across agencies to minimize the amount of information that contractors have to provide and to help ensure efficient, accurate, and consistent decisions across the government.

The objective of the EO is to help contractors come into compliance with federal labor laws, not to deny them contracts, and it encourages compliance, not suspension and debarment. The processes and tools envisioned by the EO are designed to identify and help contractors address labor violations and come into compliance before consideration of suspension and debarment. The EO does not in any way alter the suspension or debarment process; however, the expectation is that the processes and tools envisioned by the EO will drive down the need for an agency to consider suspension and debarment and help contractors avoid the consequences of that process. As a result, this EO, once implemented, will offer contractors an opportunity to come into compliance and maintain the privilege of being a federal contractor, unlike the suspension and debarment process, which could exclude them from receiving awards.

On May 28th of this year, DOL published proposed guidance. On that same day, the FAR Council also issued proposed regulations integrating the EO's requirements and the provisions of DOL's guidance into the existing procurement rules.

DOL's proposed guidance would do several things. First, it would define the terms used in the EO—administrative merits determinations, civil judgments, and arbitral awards or decisions, and provide guidance on what information related to these determinations must be reported by covered contractors and subcontractors. Second, it would define serious repeated, willful, and pervasive violations and provide guidance to contracting officers and labor compliance advisors for assessing a contractor's history of labor law com-

pliance and considering mitigating factors, most notably efforts to remediate any reported labor law violations. Third, it would provide guidance on the EO's paycheck transparency provisions.

We have received numerous comments and are now reviewing them. Nothing I say today should be taken as a prejudgment of any issue as I do not want to prejudge the outcome of that process. We are working through the comments to produce a quality guidance document that will better inform federal procurement decisions, provide contracting officers with the necessary information to ensure accurate, efficient, and consistent compliance with labor laws, help contractors meet their legal responsibilities, and remove truly bad actors from federal contract consideration, creating a more level playing field for law-abiding contractors. Most importantly, it will also ensure that hardworking Americans get the fair pay and safe workplaces they deserve.

I appreciate the invitation to testify, and will be happy to take any questions you may have.

Chairman HARDY. Thank you, Mr. Solomon. And with that, I will yield myself five minutes of time for questioning.

With your statement, Mr. Solomon, it sounds like there's quite a bit of challenges out there with people needing to be debarred or suspended. Is that correct? Is that the way I understand your statement, that there are a lot of issues out there that we are having with cause and effect that we need to make sure we are issuing debarments or suspensions?

Mr. SOLOMON. Well, Mr. Chairman, the executive order is not about suspending and debarment. It is to bring contractors into compliance so we can avoid having to go through for a contractor a suspension and debarment process.

Chairman HARDY. That is back to my question. So bring them into compliance. So is there a lot of noncompliance out there?

Mr. SOLOMON. What we have said is the vast majority of contractors do play by the rules and do not violate labor laws. But for the contractors that do violate the labor laws, we are—that is what the executive order is designed to get at.

Chairman HARDY. So when you were at the NLRB as our counsel, how many people did you debar or suspend while you were there?

Mr. SOLOMON. Well, the NLRB has no debarment or suspension process.

Chairman HARDY. Department of Labor? Okay. How many did you refer, I guess, is the question.

Mr. SOLOMON. Well, the NLRB, like various enforcement agencies at DOL, have a jurisdiction that is beyond federal contractors. So it does not come up in an investigation at the NLRB as to whether the employer involved is the federal contractor or not.

Chairman HARDY. Okay. Ms. Styles testified that the proposed rule was a chance for agencies to extort settlements from small businesses. What is your opinion on that?

Mr. SOLOMON. I do not think that is a fair statement. What this executive order does is looking for the most egregious violations, a pattern of a basic disregard of labor laws. The executive order is clear that not one violation of a labor law is going to lead to any problem in the contracting process.

Chairman HARDY. Thank you.

Ms. Rung, the construction contractors commonly state that they have usually if they are in the general they have more than seven tiers of subcontractors. In the EO proposal, as a prime, would I need copies and records of all seven tiers?

Ms. RUNG. I appreciate your question. It was extremely helpful feedback this morning from a lot of the small businesses. We have been out meeting with small businesses to talk about this and other issues. The one issue they have raised is the flow down piece of this, how primes will sort of implement this piece of it to track and measure performance by their subcontractors. And in response to that, we have done a number of things and put a number of proposals in this rule. Just to mention one, for example, one alternative in which we are seeking feedback on would allow subcontractors to take their information on labor violations and provide it directly to Department of Labor and work with Department of Labor to assess those violations. So you would essentially be taking those prime contractor out of the role of sorting through that information and evaluating the records provided to them.

Chairman HARDY. Does that individual, that prime, need to make sure that they monitor those performance also?

Ms. RUNG. So the prime contractor has always been responsible for ensuring that their subcontractors are responsible subcontractors, so that role would continue. So they have always had to ensure that their subcontractors are performing.

Chairman HARDY. Let us bring in OSHA rules. I, myself, have an OSHA 40. I am on the site continually when I was working. I have other officers that have their OSHA 40 and make sure that things are complied with. It is typically the subcontractor that you sometimes have a challenge with on that and it puts me at risk. You know, I can run that individual off, but does that put me in violation when it is somebody else's employee and we are doing everything we can to keep on track? Is that a violation?

Ms. RUNG. Thank you for the question. And certainly, if my colleague from DOL wants to jump in at any point he can, but we are really focused on the most egregious violations. So I think the GAO report from 2010 that cited several examples, gives you a good indication of what we mean by serious violations. So when they refer to, for example, a food company that has over 100 OSHA violations that ultimately result in an employee being killed, that is an example of what we are talking about.

Chairman HARDY. Can I stop you there? My time is running out. But does that violation—we are talking about violations, and what happens is it gets stuck, as you heard, in the process. It is a violation. I might be bidding on another project, and as long as that is hanging over my head, I am guilty until proven innocent.

Ms. RUNG. Well, I think there are a couple things. One, this EO has a number of provisions designed to ensure that we are not slowing down the process. So one of the key parts of this is to encourage companies to work with Department of Labor very early in the process, well before award, to help bring these companies into compliance.

Chairman HARDY. Thank you. My time is expired.

Ms. Adams? I would like to recognize Ms. Adams for five minutes.

Ms. ADAMS. Thank you, Mr. Chair.

Ms. Rung, some subcontractors have expressed concern that prime contractors do not have the requisite knowledge in labor law to make an informed decision as to their responsibility. Is there not enough regulatory discretion in the executive order and in the Federal Acquisition Regulatory Council itself to justify having the agency contracting officer and the labor compliance advisor review all covered prime contractors and subcontractors in the initial responsibility review process?

Ms. RUNG. Thank you for the question. So it has been a long-standing tenet of the federal procurement system that the prime contractors are responsible for the performance and ensuring that their subcontractors are responsible companies. The LCAs and the contracting officer are responsible for making that determination of business integrity and ethics for the primes. And that is the way historically it has worked. In this case, as I just explained, we very much appreciate and have heard from a lot of small businesses the concern about primes tracking the subcontracting piece of this, and as such, we have laid out a number of alternatives in this proposed rule for which we seek feedback, including this notion that subcontractors could go directly to Department of Labor to work with them on the reporting piece and to have Department of Labor evaluate that information.

Ms. ADAMS. Thank you. One of the main concerns voiced by those opposed to the executive order is that they fear that due to de facto, debarments will occur if contracting officers are relying on the same recommendation when making a responsibility determination. So what mechanisms are in place to ensure that this does not happen?

Ms. RUNG. So we are very much focused on bringing companies into compliance and not excluding them. And so we are doing a number of things to ensure that we can achieve that goal. And one of them is setting up a process within Department of Labor to have them work with the companies very early in the process well before the bidding to help bring them into compliance. We want to create a system where information can be shared among all the agencies, so we are ensuring that consistent decisions are being made, and we are also limiting burden to the extent possible for our contractors in terms of reporting many times.

Ms. ADAMS. Okay. There has been much criticism as to the inclusion of administrative merit determinations in the executive order. Mr. Solomon, can you explain why the decision was made to include these decisions in the disclosure requirements?

Mr. SOLOMON. Thank you for the question.

I think it is important to start with what administrative merit determinations are not. And they are not charges that are filed by workers with the enforcement agency saying that—alleging that there have been violations of the federal labor laws. Once the charge is filed, there is a full and thorough investigation by a neutral government factfinder. They take into account all evidence presented by both the workers and by the company. And in my experience, most—there are a significant number of these charges that

are found to be without merit in all these enforcement agencies. So what an administrative merit's determination is, is after this complete, thorough investigation, the agency concludes that there has been a violation of the labor law. And what we say in the proposed guidance—and we have a lot of comments on this portion of the guidance—but the guidance says that the notice or complaint that is served on the employer by the enforcement agency is, in fact, the administrative merits determination. And I would also add that there is a significant percentage of these administrative merits determinations that, in effect, become final determinations because they are either settled, or if they are litigated by the employer, which the employer has every right to do, the government has a very, very high win rate of those.

Ms. ADAMS. Okay. I am just about out of time. Mr. Chairman, I yield back.

Chairman HARDY. The gentlelady yields back.

I would like to recognize Chairman Hanna for five minutes.

Chairman HANNA. Thank you.

If you know who all these violators are and they have committed all these egregious problems, which, you know, I am sure they are out there, why not just go after them? Why create a burden for companies who have—they have hundreds of subcontractors and the process does not work the way you described it, I do not think, we do not know—a contractor does not know who he is going to hire until the day he may bid the job. So how is he supposed to screen all this stuff and all these people, use their number which may be low or whatever, and then rely on that number, put his business at risk, and hope that you guys go along?

And the other problem I have with this is what does “egregious” mean and what does “significant” mean? I mean, those are subjective words that any contract officer or any judge or jury or person can use in any way they like. So I wonder if you really have—I mean, if you have a notion of how you are going to navigate that with some degree of earnest fairness that produces the outcome you want when apparently you already know who these people are based on—if it is egregious and significant, then I guess I could find out who those people are. But our worry is, my worry, is that this will trickle downhill depending on who decides what that means and what some outside force, unhappy other contractor or second bidder, labor person, you know, union or nonunion, so what do you say to that?

Ms. RUNG. So let me, perhaps I will address the question about the information is already out there and then my colleague can jump in on some of the definitions.

The challenge for us is that the information is not always available to us. So the current penalty triggers for reporting violations into the performance system may be higher than the individual labor violations. And secondly, a contractor is not required to enter information into the federal awardee, integrity, and performance system unless it has done more than \$10 million in business. And third, not all violations are accessible to us. And I think as GAO has emphasized, that our contracting officers, for whatever reasons, are not using the information to make accurate responsibility determinations. So what we are trying to do here is ensure that our

contracting officers have timely and complete and detailed information to make these responsibility determinations which they are already required to do.

Chairman HANNA. Not for these jobs. I mean, this contractor shows up. He or she, the company is low bid. They have hired—they have based their assumptions on all these different prices that came in from who knows how many companies. And they do enter the picture and you say this person and that person is not qualified. How do you reconcile that in the real world?

Ms. RUNG. I think, you know, what we heard from some of the panelists this morning is that we are creating a level playing field by ensuring that only those contractors that play by the rules are competing in the federal marketplace.

Chairman HANNA. How could it possibly be level if they do not know in advance who those people are? Is it really a contractor's problem to get on there when apparently the information is out there?

Ms. RUNG. The information is not always available, and it is not always out there, and it is not available in a timely fashion, and it is not always available in a complete fashion. And I think the evidence has been borne out by the GAO report. So the outcomes are showing that we are awarding taxpayer dollars to companies that commit serious labor violations. And our goal here is to simply ensure that we protect taxpayer dollars.

Chairman HANNA. Mr. Solomon?

Mr. SOLOMON. To answer part of your question, I mean, the intent behind the guidance and the intent behind the creation of labor compliance advisors throughout the government is to provide a mechanism for uniform and consistent decision-making across the government. I think there is an understanding that contracting officers do not necessarily have the knowledge base to be able to make decisions over a company's labor law compliance.

Chairman HANNA. The GAO report did not evaluate whether federal agencies considered, or should have considered, these violations in awarding the federal contract. Thus, no conclusions on the topic can be drawn from this analysis. I mean, it really seems as though you have got a lot of work ahead of you to implement this in a way that is in any way reasonable or fair or provides the outcome that you want.

Ms. RUNG. Well, you know, the part—the most compelling part of the GAO report to me were the examples of the kind of companies that are receiving federal taxpayer dollars even though they have committed serious violations, including OSHA cited a company for over 100 health and safety violations. And after an employee was fatally asphyxiated after falling into a pit containing poultry debris.

Chairman HANNA. Sure, I get that. But I mean, my time has expired.

Ms. RUNG. That is the kind of violations we are talking about.

Chairman HANNA. But why is that company even out there? I mean, if you know who they are, and you do today, why did you not know yesterday? Why is that not someplace in the public domain? I swear that it must be.

Ms. RUNG. Yeah.

Chairman HANNA. My time is expired, but thank you. I apologize for cutting you off.

Chairman HARDY. The gentleman's time has expired. I would like to recognize Mr. Takai for five minutes.

Mr. TAKAI. Thank you, Chairman.

I am concerned about some of the comments made by the previous panel about the effects that this executive order may have on the federal marketplace. So Ambassador Rung, what do you say about those—what do you say about those arguments made by them about primes and subcontractors exiting the federal marketplace if they have to comply with this executive order?

Ms. RUNG. Yeah. Thank you for the question.

I think when the Federal Awardee Performance and Information Integrity System—I know that is quite a name, FAPIIS, was introduced per statute in 2010, we heard similar concerns that by making transparent performance information and violations we would be keeping good companies out of the marketplace or, you know, discouraging primes from engaging with subcontractors. And in the end, we did not see an impact on the type of companies entering our federal marketplace. However, I do agree with you that we need to do more to ensure that we are continuing to bring good companies into the marketplace. And I think there are a number of reasons why they are not entering the marketplace today, many of which I outlined back in a December 4, 2014 memo where I talked about ways to drive greater economy and efficiency in the federal marketplace, and not the least of which is I think it is incredibly challenging for our contractors to navigate through 3,200 separate procurement units across the federal marketplace with very little collaboration and sharing of information.

Mr. TAKAI. Yeah. I appreciate our efforts to bring more companies into the federal marketplace. I think the question is that we currently have companies in the federal marketplace that we might be pushing out.

So my other question is in regards to providing prime contractors with the opportunity to work with contracting officers and the LCAs on disclosures. So will subcontractors have the opportunity to access the LCAs regarding the disclosures?

Ms. RUNG. If I could just address your one point about this driving out companies already in the marketplace, particularly small businesses. We are taking a number of steps to really help minimize the burden on companies, and in particular, small businesses. A couple examples. We are phasing in parts of this rule over time to give companies a chance to acclimate themselves to this new rule. And secondly, you know, we have outlined some alternatives that I have discussed earlier that I think will help minimize that. The reporting requirements of subs to primes. We are improving the IT infrastructure. Most importantly, and I think this really cannot be emphasized strongly enough, we are limiting this executive order to contract awards over \$500,000. And when you start with a base of several hundred thousand small businesses in the federal marketplace and you take away from that companies that are doing business under the 500,000 threshold for which this EO would not even apply, and then you take from that the vast amount of companies that are already complying with labor laws,

you are talking about a very small fraction of companies that would have any disclosure requirements whatsoever.

Mr. TAKAI. But you are talking about 500,000 for the prime, or 500,000 for every sub?

Ms. RUNG. The 500,000 limit applies to both primes and subs.

Mr. TAKAI. Okay. So that could be problematic for subs.

Ms. RUNG. No. This is an advantage to them because what we are saying in the executive order is if you are awarded a contract under \$500,000 at both the prime or sub level, this executive order does not apply to you. And for the vast majority of small business transactions, they fall under the \$500,000 award.

Mr. TAKAI. Okay. Well, if you can get us information regarding that, that will be helpful.

Okay. So my next question is would a subcontractor who is deemed nonresponsible by a prime have the same process of redress that a prime has if it is ruled nonresponsible by the contracting officer? In other words, yeah, does the subprime contractor have redress in this particular case?

Ms. RUNG. Yeah. So historically, the performance of the subcontractor has been the responsibility of the prime. So it would be the prime that would ensure that there is satisfactory performance and/or there is business integrity and ethics. And that is a relationship between the two of them that the sub would work through with its prime.

Mr. TAKAI. Okay. But if they are being labeled as nonresponsible by prime, is there recourse at your level? Is there anything they can do? I have eight seconds.

Ms. RUNG. I am not aware of that.

Mr. TAKAI. All right.

Ms. RUNG. But I am happy to look into it and see if I can get you a more complete answer.

Mr. TAKAI. Okay. Thank you.

Thank you, Mr. Chairman.

Chairman HARDY. The gentleman yields back.

I would like to recognize Mr. Rice for five minutes.

Mr. RICE. Thank you, Mr. Chairman.

This is all very interesting to me. You heard me talking earlier, I think, about the fact that for the last five years the regulatory burden has mushroomed under the federal government. You also heard me tell the SBA—not just the Federal Government, the SBA says that for a firm under 20 employees, the federal regulatory burden costs \$10,585 per employee per year. So let me ask you, with respect to small businesses that have to comply with this new law, is this going to be free for them or is it going to cost them money?

Ms. RUNG. So we very much recognize that there is a cost to this proposed rule.

Mr. RICE. So the answer is yes.

Mr. Solomon, do you agree with that?

Mr. SOLOMON. Yes.

Mr. RICE. Okay. We have had more small businesses closing than we have being formed in this country in the last five years, the first time that happened since the Great Depression. I think that has a lot to do with this mushrooming regulatory burden. Do

you think this new rule is going to ease their regulatory burden or is it going to pile more on their heads?

Ms. RUNG. This is designed to create a more level playing field for small businesses.

Mr. RICE. Okay. So I will take that as it is going to add more.

Mr. Solomon, what do you think?

Mr. SOLOMON. I agree with my colleague.

Mr. RICE. Okay. Good.

You know, you were saying that you are trying to protect taxpayer dollars. I mean, any single transaction that occurs in commerce, I guess we could look at every single transaction from a bank deposit to a withdrawal and say there may be a taxpayer dollar involved so we should get involved in that. Should the government be involved in every single transaction?

Ms. RUNG. So it has been a longstanding tenet of the federal procurement system that when we spend taxpayer dollars we are doing so while we are also ensuring that the contractor receiving those taxpayer dollars are a responsible source. And that means that there—

Mr. RICE. Ms. Rung, is this the only regulation that you oversee?

Ms. RUNG. I oversee the federal acquisition regulations, so there are several.

Mr. RICE. What have you done? How long have you been with this department?

Ms. RUNG. I was confirmed a year ago this month.

Mr. RICE. Okay. What have you done that has a material reduction in small business cost or time in your regulatory authority?

Ms. RUNG. So there have been a number of successful steps forward in the small business arena in the past year. One was creating set-asides for small businesses on task and delivery orders. One was working into senior management performance plans, small business goals. And we have also, you know, worked on a number of other provisions—

Mr. RICE. How much time or money do you think you have saved small businesses as a result of these?

Ms. RUNG. I think in the end, by doing business with companies that comply with labor laws and all laws, we ensure a greater economy and efficiency in federal procurement, and that has long been understood.

Mr. RICE. So the answer would be none, is that what you are saying?

Ms. RUNG. The answer is the intent of this executive order is to ensure that we promote economy and efficiency by ensuring that we do business with companies that comply with laws.

Mr. RICE. Mr. Solomon, you were at the National Labor and Relations Board when, I think, in fact, you were the guy who issued the opinion that Boeing could not move their Dreamliner production line from Washington to South Carolina; is that right?

Mr. SOLOMON. I issued the complaint. It was not as you state. The theory of the case was not as you state. It was not about the opening of South Carolina.

Mr. RICE. Do you think the government should be able to say where businesses can open their production lines? Do you think the

Federal Government should be able to dictate where a business can open its production line?

Mr. SOLOMON. The business of the complaint was not saying where Boeing could locate its business. The theory of the complaint was that they would have built this line in Seattle as they have done all other lines except for the fact that their employees unionized and would go on strike.

Mr. RICE. All right. So if you believe that the government has that level of intrusive authority into a business, do you not think that this new proposed rule could very easily be used for political purposes to grant government contracts to people who are favored by the administration? It seems to me like this rule is rife with potential for corruption.

Mr. SOLOMON. With all due respect, Congressman, I think you will find nothing in the guidance or the FAR rule that would lead to that conclusion.

Mr. RICE. All right. I appreciate very much your time and I yield back.

Chairman HARDY. The gentleman yields back.

Thank you for being here. Thank you for your participation. I just would like to state a couple of things. Fifty-seven percent of the Associated Builders and Contractors say that under this rule they will no longer participate on government contracts. That is huge. Last year, small businesses received over 57 billion of non-commercial item contracts. This is nearly 60 percent of the prime contract dollars spent with small businesses. At a time when the federal contractors are already struggling, I wish I could say that I am leaving here today convinced that the administration heard the concerns being expressed by our small businesses witnesses and are going on to respond in an appropriate manner. So I hope you really consider what has been said here today and think about it. I thank you for being here. I appreciate your testimony. I know it is hard to come here and stand before people sometimes, and unfortunately, this happens, but I hope you will reconsider your thought process, at least at my standpoint, and thank you for being here.

Mr. SOLOMON. Thank you.

[Whereupon, at 11:46 a.m., Subcommittees were adjourned.]

A P P E N D I X

STATEMENT OF ANGELA B. STYLES CHAIR, CROWELL & MORING LLP

BEFORE THE HOUSE COMMITTEE ON SMALL BUSINESS SUBCOMMITTEE ON CONTRACTING AND WORKFORCE SUBCOMMITTEE ON INVESTIGATIONS, OVERSIGHT AND REGULATIONS

SEPTEMBER 29, 2015

CHAIRMAN HANNA, CHAIRMAN HARDY, CONGRESSMAN TAKAI, CONGRESSWOMAN ADAMS, AND MEMBERS OF BOTH SUBCOMMITTEES I appreciate the opportunity to appear before you today to discuss the impact of the proposed Federal Acquisition Rule (“FAR”) Rule and Department of Labor (“DOL”) Guidance implementing the Fair Pay and Safe Workplaces Executive Order (“EO 13673”).¹

As Chair of the Crowell & Moring Government Contracts Group, and as former Administrator for Federal Procurement Policy at the Office of Management and Budget, I have worked closely with small business contractors throughout my professional career. Based upon over two decades of experience in federal procurement, I am deeply concerned that the EO will undermine the government’s long-standing policy of maximizing contracting opportunities for small businesses. Certainly, no one opposes the principles of “fair pay” and “safe workplaces” for employees of government contractors, and the Administration itself has acknowledged that “the vast majority of federal contractors play by the rules.”² But if the EO is aimed at only a small number of bad actors, then surely there is a more efficient way to accomplish this goal than imposing requirements that will lead to procurement delays, the blacklisting of ethical companies, and reduced competition in the federal marketplace. My testimony today highlights five principal concerns about the substance of the EO as it relates to small businesses:

- Potentially severe unintended consequences for small businesses.
- High compliance costs that will deter small businesses from participating in the federal marketplace.
- The diversion of federal employees from assisting and growing our small businesses to collecting data, monitoring compliance, and enforcement of federal and state labor laws with a high risk of *de facto* debarment.

¹ Fair Pay and Safe Workplaces Proposed Rule, 80 Fed. Reg. 30,548 (May 28, 2015); Guidance for Executive Order 13673, Fair Pay and Safe Workplaces, 80 Fed. Reg. 30,574 (May 28, 2015); EO 13673, Fair Pay and Safe Workplaces 79 Fed. Reg. 45,309 (Aug. 5, 2014).

² Fact Sheet: Fair Pay and Safe Workplaces Executive Order Jul 31, 2014, <http://www.dol.gov/asp/fairpay/FPSWFactSheet.pdf> (last visited July 2, 2015).

- A flawed Initial Regulatory Flexibility Act analysis.
- Failure to give even the most basic rationale for the necessity of this rule.

For a more in-depth analysis of other portions of the Proposed Rule and the potential effect on the entire procurement system, I refer you to the official comments to the Proposed Rule submitted by the National Association of Manufacturers (“NAM”), a client of Crowell & Moring, and attached to this testimony. Over the course of several months, we have been fortunate to assist NAM with an analysis of the Proposed Rule and preparation of comments for official submission. While I am testifying on my own behalf today, I have worked extensively with industry in understanding and assessing the potential impact of this rule.

The EO Creates Potentially Severe Unintended Consequences for Small Businesses

On May 28th, the Administration released a 131-page Proposed FAR Rule and a 106-page Proposed DOL Guidance to implement EO 13673. Under the EO, a small business bidding on a federal prime contract or subcontract valued at more than \$500,000 will be required to disclose “violations” of the fourteen enumerated labor laws and be required to provide mitigating documentation to the federal government and/or prime contractors. The collection and provision of documentation on a wide array of labor compliance issues will cause significant disruption to small businesses, and forces the delivery of competitively sensitive information to prime contractors, the Department of Labor, or both. The notion of providing this information to prime contractors is especially problematic in the government contracts marketplace where it is not uncommon for contractors to team on one project only to be competitors on a separate procurement. Under the arrangement proposed by the EO, prime contractors will learn significant information about a small business subcontractor’s labor compliance history that could then be used as ammunition in bid protests against the company in subsequent competitions. In other words, the EO could radically alter the prime/subcontractor relationship that the government depends on for the delivery of innovative products and solutions.

There is also the risk—acknowledged in the Proposed Rule—that prime contractors will shy away from doing business with subcontractors with any kind of labor violation, no matter how minor, because it could slow down the award of the potential contract or jeopardize the award of the contract altogether. This raises the chilling specter of small businesses with minor labor issues being “frozen out” of the marketplace.

And let us not forget that over twenty percent of federal procurement dollars are awarded to small businesses as *prime* contractors on federal projects. Under the EO, these small business prime contractors will face a daunting task. In addition to satisfying the rule’s onerous compliance and reporting requirements with respect to their own corporate history, they will be charged with collecting,

analyzing, and updating information with respect to their subcontractors. If any of those subcontractors are large federal contractors—which is often the case—it is not hard to imagine a small business being subsumed in paperwork when its large business subcontractor forks over boxes and boxes of paperwork on its historical labor compliance, mitigating circumstances, and other information required under the EO. Instead of delivering critical services to federal agencies that rely on their support, small business prime contractors will be forced to re-allocate precious resources to generate paperwork for paperwork’s sake.

**Pricey Compliance Costs will Diminish Small Businesses
Participation in the Federal Marketplace**

One fact is crystal clear: compliance with the new requirements will be incredibly expensive and burdensome. These costs hit small contractors especially hard, as they have limited resources to build new compliance infrastructure, track legal allegations, or even challenge frivolous claims. All of this comes at a time when the Government is attempting to encourage more innovative small businesses and commercial item contractors to enter the government marketplace.

Section 4 of EO 13673 requires the FAR Council to minimize the burden of complying with the regulation on small entities.³ While the Proposed Rule contains several steps to minimize the burden such as the possible phasing-in of flow-down requirements and the exemption of subcontracts for Commercial Off the Shelf (“COTS”) purchases, the Proposed Rule introduces a host of new labor law compliance reporting requirements and creates substantial administrative burdens for small businesses that want to sell goods and services to the federal government.

For even the largest, most sophisticated government contractors, the collection of subcontractor labor compliance data will create an unprecedented data collection and reporting burden. If compliance will be difficult for large contractors with in-house personnel and expertise, satisfying the requirements will be near impossible for small businesses when they are awarded prime contracts and are therefore required to make responsibility determinations for their own subcontractors. Many small businesses lack the staffing or compliance infrastructure to collect and evaluate information about labor law violations from subcontractors with hundreds or even thousands of employees. In all likelihood, small businesses will be overwhelmed with the task of trying to collect and evaluate the labor violations of their subcontractors, and this heavy burden is compounded by the fact that the process will have to be repeated every six months after award.

Small business contractors are already expending substantial resources to comply with federal labor laws and regulations, often-times without the benefit of large administrative staffs, and sophisticated legal counsel. The additional costs, risks, and compliance

³E.O. § 4

requirements associated with the EO may force some small businesses to exit the federal marketplace altogether. In the same vein, potential new entrants to the government contracts market may be deterred by the up-front investment that will be required to comply with the EO. I think we can all agree that reducing the number of companies competing for federal contracts is bad for everyone: bad for our job-creating small businesses, which will lose critical contracting opportunities; bad for the government, which will have greater difficulty meeting statutorily-mandated socioeconomic contracting goals; and bad for the taxpayers, because reduced competition will lead to higher prices.

Concerns about the collateral effects of the EO on small entities is shared by the Small Business Administration (“SBA”) Office of Advocacy, the federal government’s own small business watchdog. According to public comments submitted by that Office, the Proposed Rule is “very burdensome,” “raises the cost of doing business with the federal government,” and could lead to the “reduction of the number of small businesses that participate in the federal marketplace.”⁴ Notably, the SBA’s Office of Advocacy recommends that the new requirements not apply to small businesses at least until the subsequent rulemaking when DOL identifies the state equivalents of the fourteen federal labor laws.

Diversion of Federal Employee Resources to Data Collection and Enforcement with a Specter of De Facto Debarment

The Proposed Rule and Guidance do not address how the federal acquisition workforce is expected to divert resources from guiding and growing small businesses to the collection, analysis, and enforcement of labor laws in a fair and even-handed way. As a threshold matter, each of the fourteen federal laws identified in EO 13673 is extremely complex, and the caselaw is constantly evolving. There is not a lawyer in Washington who could claim to be an expert on each of the fourteen identified federal labor and employment laws, much less the yet-to-be-identified “equivalent state laws.”⁵ So it is wholly unreasonable to assume that a contracting officer (“CO”) or agency labor compliance advisor (“ALCA”) will have a sufficient understanding of the universe of relevant labor laws to be able to make the required responsibility determinations, and to make them consistently.

The tasks delegated to COs and ALCAs under EO 13673 and the Proposed Rule are made more difficult because of the short window of time in which responsibility determinations must be made. In order to meet the requirements of the Proposed Rule, a CO will be required to take the following steps for every contract award over \$500,000 in which an offeror reports a labor violation:

⁴ SBA Office of Advocacy, Regulatory Comment Letter re: Proposed Regulation to Implement Executive Order 13673 “Fair Pay and Safe Workplaces,” 80 Federal Register 30,547, May 28, 2015, FAR Case 2014-025, available at https://www.sba.gov/sites/default/files/2015_08_26_15_20_33_2.pdf

⁵ The DOL announced in its Guidance that it will define “equivalent state laws” as part of a future rulemaking.

- First, the CO must check to see if the contractor has disclosed any violations in the System for Award Management (“SAM”) as part of the initial certification;
- Second, the CO must request all relevant information about the administrative merits determinations, civil judgment, or arbitral award;
- Third, the CO must furnish the ALCAs with all of this information and request that the ALCA provide written advice and recommendations within three business days of the request;
- Fourth, the CO must review the DOL Guidance and the ALCA’s recommendation;
- Fifth, the CO must consider the mitigating circumstances such as the extent to which the contractor has remediated the violation or taken steps to prevent its recurrence;⁶
- Sixth, the CO must make a responsibility determination as to whether the contractor is a responsible source with a satisfactory record of integrity and business ethics;
- Lastly, the CO will need to take the time to document the various stages of this process in order to develop a more favorable administrative record in preparation for bid protests regarding the responsibility determination.

Of course, the burden on small business contractors, subcontractors, and the acquisition workforce does not end there. After contract award, the contractor has to provide updated information for itself and its subcontractors every six months.

Given the number of contract actions that will be subject to this process, these requirements will no doubt result in a less efficient and more cumbersome procurement process. Due to the enormous demands on a CO’s time, and the complexity of making responsibility determinations, the requirements of the Proposed Rule will likely result in conflicting and redundant decisions by COs.

The most troubling unresolved question is whether these responsibility decisions could result in *de facto* debarment without the due process or the procedural protections embedded in Subpart 9.4 of the FAR. For instance, one CO may find a small business to be non-responsible after determining that a handful of OSHA violations constitute evidence of a “pervasive” problem. Another CO, in an effort to reduce her crushing workload, could understandably decide to follow his or her colleague’s responsibility determination—about the same underlying facts—without conducting the required independent analysis. Indeed, such failure would seem much more likely when a small business is involved, a small business without the resources to fight back against an arbitrary decision made without independent analysis. If this were to occur, the government would have improperly effectuated a *de facto* debarment. While small businesses’ understand that contracting with

⁶Fair Pay and Safe Workplaces Proposed Rule, 80 Fed. Reg. 30,548 (May 28, 2015) (“The Executive Order (EO) requires that prospective and existing contractors disclose certain labor violations and that contracting officers, in consultation with labor compliance advisors, consider the disclosures, including any mitigating circumstances, as part of their decision to award or extend a contract.”)

the federal government is a privilege and not a right, contractors (and particularly small businesses) have a due process liberty interest in avoiding the damage to their reputation and business caused by the stigma of broad preclusion from government contracting.⁷ In sum, the requirements of the EO create a slippery slope to the “blacklisting” of companies—effectively preventing them from competing for federal contracts—based upon the opinion of one contracting officer.⁸

The EO is grounded in the proposition that a greater understanding of—and compliance with—labor laws will lead to increased economy and efficiency in the procurement process. But rather than ensuring the timely and predictable delivery of goods and services, the EO and the implementing regulations divert precious federal resources and inject uncertainty into the procurement process that will delay critical federal purchases and side-step the procedural due process rights of contractors.

The FAR Council’s Initial Regulatory Flexibility Analysis is Flawed

In addition to the substantive flaws, the FAR Council’s regulatory analysis⁹ falls short of the obligations imposed by EO 12866,¹⁰ the Paperwork Reduction Act,¹¹ and the Regulatory Flexibility Act (“RFA”).¹² Due to the fact that the Proposed Rule is likely to have a significant impact on a substantial number of small businesses, the RFA requires that the FAR Council prepare an Initial Regulatory Flexibility Analysis (“IRFA”) describing the impacts of the rule on small entities. Under the RFA, the IRFA must address a number of required elements including “a description of the projected reporting, recordkeeping and other compliance requirements of the Proposed Rule,” and a description of any “significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.” Here, the FAR Council’s IRFA does not adequately consider these elements and fails to calculate the true impact that the new requirements will have on small businesses across the country.

Absent from the FAR Council’s IRFA is any substantive analysis of the recordkeeping or ongoing compliance requirements that will be imposed on small businesses. For most contractors, just the initial step of determining whether their company has any violations to disclose will be a significant undertaking. At present, most companies do not have systems in place to implement the new informa-

⁷ *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 598 (D.C. Cir. 1993).

⁸ *Phillips, et. al, v. Mabius et. al*, Civ. Action No. 11-2021, 2012 WL 476539 (D.D.C.) (“*De facto* debarment occurs when a contractor has, for all practical purposes, been suspended or blacklisted from working with a government agency without due process, namely, adequate notice and a meaningful hearing.”) citing *Trifax Corp. v. Dist. Of Columbia*, 314 F.3d 641, 643-44 (D.C. Cir. 2003).

⁹ Accompanying the Proposed Rule is a Regulatory Impact Analysis (“RIA”) that is required under EO 12866 (and, by adoption, EO 13563). See Federal Acquisition Regulation (FAR) Case 2014-025, Fair Pay and Safe Workplaces Regulatory Impact Analysis Pursuant to Executive Orders 12866 and 13563.

¹⁰ EO 12866 directs federal agencies to assess the economic effects of their proposed significant regulatory actions, including consideration of reasonable alternatives.

¹¹ 44 U.S.C. §§ 3501-3521.

¹² 5 U.S.C. § 605(b).

tion collection and reporting requirements of the EO. In order to comply, contractors will be required to create new databases and collection mechanisms to account for information subject to disclosure. Moreover, contractors would be required to develop new internal policies and procedures and hire and train new personnel to ensure compliance with the proposed requirements.

Moreover, the IRFA fails to consider alternatives to the Proposed Rule that could accomplish the same objectives. Had the FAR Council considered less costly alternatives, the Council would have concluded that federal dollars would have been better spent improving existing processes rather than requiring data collection and self-reporting which will only increase costs for small businesses.

Under the present system, DOL already reviews federal contractors' compliance with federal labor laws through the Wage and Hour Division, the Occupational Safety and Health Administration, and the Office of Federal Contract Compliance Programs. DOL collects data from these enforcement agencies and makes much of it publicly available through its Online Enforcement Database ("OED"). Rather than requiring contractors to collect and report data that the government already has in its possession, the government could improve its own information-sharing channels so that COs can have the information they need at their fingertips when making responsibility determinations.

The EO is Unnecessary and Redundant

Finally, a significant and wholly unanswered question: why is the federal government creating this burdensome process in the first place? Each and every labor law identified in the EO has its own separate penalties for companies who violate the respective laws. And, unlike the EO, those labor laws and the associated penalties were created by Congress rather than mandated by the Executive Branch. The federal procurement system also already includes adequate remedies to prevent companies with unsatisfactory labor records from being awarded federal contracts. Specifically, the suspension and debarment official ("SDO") within each federal agency has broad discretion to exclude companies from federal contracting based upon evidence of any "cause so serious or compelling a nature that it affects the present responsibility of a Government contractor." To the extent that a contractor's labor compliance record impacts its present responsibility, FAR Subpart 9.4 sets forth the proper channels for suspension and debarment proceedings.

With an established and effective system in place, it makes no sense to create a new bureaucracy to review these issues on a contract-by-contract basis with the possibility of astoundingly inconsistent decisions by different agencies and different COs.

Conclusion

Given its scope and complexity, this EO will be impractical—if not impossible to implement. The substantial costs of compliance

imposed on federal contractors will likely lead to higher procurement costs and will likely drive many small businesses out of the federal marketplace altogether. Moreover, these costs will be borne disproportionately by companies who can least afford them—our small businesses. This is an entirely unacceptable outcome considering that the goals of the EO—targeting contractors with the most “egregious violations”—could be accomplished through the enforcement of existing labor laws and our existing suspension and debarment system. As such, the FAR Council and DOL should rescind the Proposed Rule and Guidance. This concludes my prepared remarks. I am happy to answer any questions you may have.



**Testimony of Theron Peacock, P.E, BSCP
Senior Principal/President
Woods-Peacock Engineering Consultant, Inc.**

**Before the House Committee on Small Business,
Subcommittees on Contracting and Workforce and
Investigations, Oversight and Regulations
September 29, 2015**

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Introduction

Subcommittee Chairmen Hanna and Hardy, Ranking Members Takai and Adams, and members of the committee,

The American Council of Engineering Companies (ACEC) appreciates the opportunity to testify before you today about the issues surrounding the Fair Pay and Safe Workplaces Executive Order, (E.O. 13, 673). ACEC appreciates the efforts of the U.S. Department of Labor (DOL) and the FAR Council to improve compliance with federal labor laws among federal government contractors and subcontractors. ACEC's small, medium and large firms believe that small businesses can flourish in the federal market, but there must be continued oversight by this and other committees to reduce barriers to market entry. It should be noted that bad actors are less than .01 percent of the total contracting force.¹ Even President Obama has said that "the vast majority of the companies that contract with our government,... play by the rules. They live up to the right workplace standards."² The Chairmen of the House Education and Workforce, Oversight and Government Reform and Small Business Committees have stated that the Guidance is "fixing a problem that does not exist."³

My name is Theron Peacock and I am a Senior Principal/President of Woods Peacock Engineering Consultants, located in Alexandria, Virginia and we have 16 employees. Woods Peacock is a service disabled veteran-owned small business that focuses on service to a very broad range of federal agencies for projects in the US and abroad.

My firm is an active member of ACEC – the voice of America's engineering industry. ACEC's over 5,000 member firms employ more than 380,000 engineers, architects, land surveyors, and other professionals, responsible for more than \$500 billion of private and public works annually. Almost 85% of these firms are small businesses. Our industry has significant impact on the performance and costs of our nation's infrastructure and facilities.

We are at a critical juncture in our nation's history as the risk to the public is growing at an alarming rate, as there has been ongoing neglect of the nation's infrastructure. At the same time, we are coming out of the largest economic crisis that affected all professional engineering firms. The construction industry, which bore the brunt of the recession, is finally coming back to fiscal

¹ Karla Walter and David Madland, Center for American Progress, At Our Expense: Federal Contractors that Harm Workers Also Shortchange Taxpayers (2013), available at <https://www.americanprogressaction.org/issues/labor/report/2013/12/11/80799/at-our-expense/>.

² President Barak Obama, Remarks by the President at the Signing of Fair Pay and Safe Workplace Executive Order (Jul. 31, 2014)

³ Press Release, House Small Business Committee, House Committee Chairmen Call for Withdrawal of Administration's Harmful, Unnecessary Blacklisting Proposal (July 15, 2015) (on file with author).

health. Recent contracting changes, like the implementation of Fair Pay and Safe Workplaces executive order, issued by the current Administration threaten small business participation in the Federal market.

II. Proposed Process

The process as outlined by the Guidance requires four steps. First, the prime contractor must disclose awards greater than \$500,000 for “goods and services including construction,”⁴ and any violations or allegations of violations of labor laws within the preceding three years. Second, the contracting officer, prior to making an award, must “provide contractors with an opportunity to disclose any steps taken to correct any reported violations or improve compliance with the Labor Laws, including any agreements entered into with an enforcement agency.”⁵ Third, the contracting officer and the Labor Compliance Advisor (LCA)⁶ shall then determine if the prime is a “responsible source with a satisfactory record of integrity and business ethics.”⁷ Fourth, even after a contract has been awarded, the Guidance requires semi-annual reporting of any violations. The Guidance also applies to subcontracts at every tier, so many subcontractors, whether they have a direct contract with the prime or not, must submit this information. If the contract has been executed and there is an accusation of a labor violation, the contracting officer has four potential courses of action; require remedial measures; decline to exercise an option; terminate the contract; or refer for suspension and debarment.⁸

The Council has three broad areas of concern with the proposed Guidance. First, the reporting is overly burdensome. It requires both prime and subcontractors to furnish information that the Government already receives. Second, the reporting burdens the business relationship between the contractor and subcontractor by creating a blacklist of allegedly “unqualified” contractors and subcontractors. Third, non-final judgments or complaints and allegations of non-compliance with labor laws are required to be reported to the contracting officer. If adopted, this mandate could allow for contracts to be terminated on claims that may be proven invalid, raising very serious due process concerns. All of these concerns could have the effect of prompting well-qualified firms to withdraw from the federal market altogether.

III. Reporting

There are four problems with the reporting requirement in the proposed Guidance. First, it is duplicative and therefore, burdensome, example, small businesses will have to report to prime contractors. Second, the process envisions a seamless transfer of information between the LCA and the responsible contracting officer, which is inconsistent with current practice. Third, with the recent OPM data breach, there is a concern that the federal government cannot handle classified data, and would now have sensitive business data in one potentially vulnerable database. Fourth, with the amount of data that DOL requires to be shared between primes and subcontractors, there are unintended market consequences for those participants not addressed by the Guidance.

⁴Proposed Guidance at 30576.

⁵ *Id* at 30576.

⁶ The Labor Compliance Advisor is a senior official designated within each agency to provide “guidance on whether (a) contractors’ actions rise to the level of a lack of integrity or business ethics.” *Id* at 30577.

⁷ *Id* at 30576.

⁸ *Id* at 30577.

Burdensome

DOL's Guidance has identified 14 federal labor laws and executive orders or equivalent State laws that are applicable to the reporting requirement.⁹

The Fair Labor Standards Act (FLSA)	The Occupational Safety and Health Act of 1970 (OSH Act)
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	National Labor Relations Act (NLRA)
Davis-Bacon Act	Service Contract Act
Equal Employment Opportunity Executive Order (EEOC)	Section 503 of the Rehabilitation Act of 1973
Vietnam Era Veterans' readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974	Family and Medical Leave Act (FMLA)
Title VII of the Civil Rights Act of 1964	Americans with Disabilities Act of 1990 (ADA)
Age Discrimination in Employment act of 1967	Establishing a Minimum Wage for Contractors Executive Order

However, the Guidance is reserving for at a later date the review of applicable equivalent state laws. This failure to consider applicable state laws at the current time precludes for a thorough review of consequences. It creates instability for firms to accurately assess the burdensome scope of the Guidance and FAR regulations.

The broad scope of this change has massive implications for the engineering community. These laws and executive orders already require reporting and/or judicial hearings. For example, firms are required to report annually on compliance with the EEOC, the Vietnam Era Veterans' Act, OSHA and the Rehabilitation Act. Under Davis-Bacon, weekly submissions are sent to the DOL. In addition, the firm must submit annual reports to the federal System for Award Management (SAM) database to maintain their eligibility for government work, which also reports on their subcontractor's compliance with the Service Contractor Act. Between existing weekly and annual reporting, asking business to resubmit this information is duplicative and wasteful. Given that almost 85 percent of ACEC firms qualify as small-businesses, these additional requirements create new hurdles for small firms participating in government work. Not only will the firms have to comply with the data gathering, but many will need to hire additional legal and human resources employees or consultants to review their files for the past three years. This data gathering will entail additional overhead on firms. As the margins on engineering work are quite small, typically 3 percent, new overhead requirements may preclude firms, including many small firms, from participating in this market. As many prime contractors work to meet admirable small business subcontracting requirements, fewer small businesses will be able to afford to participate in this market. The cost of compliance will hurt their margins even more than larger firms which have greater resources. This reporting burden will reduce innovation and

⁹ *Id* at 30576.

competition on government contracts that are integral to best performance while ultimately increasing the cost of the project to the government.

Seamless Transition Between the LCA and the Contracting Officer

The envisioned process requires that the LCA and the contracting officer review all Labor violations within a three day window. The contracting officer will make the determination regarding the prime or subcontractor's status as a responsible source if the window lapses. This paradigm is deeply flawed by the nature of federal contracting. Federal contracting takes time—and the GAO has reported “services acquisitions have been plagued by inadequate acquisition planning”¹⁰ ACEC members report that acquisition planning can take over 18 months, and that is before these new regulations are implemented. This requirement adds an additional and unnecessary layer to an already overburdened system. The flawed assumption that decisions will be made in three days will prove to further slow the system.

Data Security

The Guidance calls for GSA to build a master website and database for contractors to submit Labor information and for contracting officers to check on their projects. Given that the July 2015 Office of Personnel Management's data breach affected 22 million records,¹¹ there is some concern about the federal government having a single database which will hold all of the labor violations for federal contracting. Currently the data is being stored at different locations, and now under the Guidance, these alleged labor violations will now be kept in a single GSA database.¹² This structure provides a single source for confidential information for both the employers and the employees. Although the federal government has this information currently, it does not make sense to create a website that provides hackers and foreign governments with the opportunity to create better profiles of the companies that do business with the federal government.

IV. Contractor –Subcontractor Relationship

Blacklisting

There are two ways that the federal government has proposed to undertake the prime-subcontractor reporting. Under the current proposal, the federal government requires that at the “time of the execution of the contract” contractors must “require subcontractors performing (on) covered subcontracts to disclose any administrative merits determination, civil judgment, or arbitral award or decision rendered against the subcontractor within the preceding three-year period”¹³ of any of the outlined labor laws. This raises a difficult choice for prime contractors. Before they sign the contract, they must in effect “pre-clear” their subcontractors. This may sound like a simple situation, but many subcontracts are signed hours before the prime submits their contracts. This creates a further tension as the contracting officer must clear all potential

¹⁰ U.S. Government Accountability Office, GAO-11-672, Acquisition Planning: Opportunities to Build Strong Foundations for Better Services Contracts, Report to Congressional Requesters (2011), available at <http://www.gao.gov/new.items/d11672.pdf>.

¹¹ Sarah Wheaton and Tal Kopan, *OPM Director Resigns Amid Data Breach Scandal*, POLITICO (July 10, 2015, 2:59 PM), <http://www.politico.com/story/2015/07/opm-katherine-archuleta-resigns-119959.html>.

¹² Proposed Guidance at 30593.

¹³ *Id.* at 30577.

subcontractors prior to the contractor awarding the work. The requirement incorporates an additional step in an already lengthy process.

The FAR Council proposes a second option where the subcontractors report their own labor violations to DOL, which would “then assess the violations.”¹⁴ Under this scenario, the prime would have to check with the contracting officer or with the DOL to see if the proposed subcontractors in the contract would qualify to work for the government. In either reporting scenario, the unintended consequence would be the creation of a “blacklist” for subcontractors, triggering claims by subcontractors against the prime contractor and/or the Federal Government for improper disqualification for award of a subcontract. The proposed blacklist could further entrench the encumbered process while eliminating new talent from the federal labor market. This situation is particularly problematic for engineering firms as these entities subcontract up to 50 percent of their contract. This is required due to the level of technical specifications in engineering contracts, from geotechnical to HVAC to mapping, requiring multiple specialty firms to meet these needs. The new requirements proposed under the Guidance would simply multiply existing burdens on the team while failing to recognize the realities of providing design services to the public.

The current relationship between the prime and the subcontractor will be damaged under this proposed regulation. Given that prime contractors seek to select subcontractors on the basis of qualifications, adding a further element to the selection process is extremely burdensome. Design and construction is a highly complicated business. Engineers design buildings to meet myriad requirements including safety, energy efficiency, functionality, and rigorous standards for homeland and national security. Firm employees must be able to meet the federal security clearance requirements in many instances, which serves to limit market participation. If the subcontractors must now also be pre-approved by the government through the proposed Guidance, the contractor is further limited to an ever narrowing pool of subcontractors. The end result of the government’s “blacklist” policy will be to limit the participation of both small and large firms in the federal market; and, once again, many firms will just choose not to participate.

Data Sharing with Competitors

Within the engineering industry, primes and subcontractors often change roles in different projects. There is a disincentive for subcontractors to share sensitive labor information with the prime when there is the potential that the firm will compete against that prime in another solicitation. Data sharing of confidential business information could eliminate a competitive advantage between two companies. While this problem might be mitigated if the government received information from subcontractors directly, fundamental concerns over how the process will work linger within the Guidance. There are no guarantees that information sharing will be prohibited given that it is currently an optional enforcement mechanism within the FAR comments. Firms face a level of insecurity between small margins and the potential that competitors could force them out of the federal market due to labor violations that include valuable business intelligence. There needs to be a way for the industry to work reasonably with these guidelines, and the current Guidance does not advance that effort.

V. Due Process Implications

¹⁴ *Id.* at 30582.

Primes and subcontractors must report violations of Labor laws that include administrative merits determinations; civil judgements, and arbitral awards or decisions that have occurred within the past three years.¹⁵ The contractors and subcontractors must report even if “underlying conduct that violated Labor Laws occurred more than three years prior to the date of the report.”¹⁶ Moreover, these groups must report even if the violation is outside of the scope of any federal procurement.

The scope of this requirement is too broad. Administrative merits determinations encompasses any complaint from the following:

DOL Wage and Hour division	DOL’s OSHA or any state agency designated to administer an OSHA-approved State Plan
DOL’s Office of Federal Contract Compliance Program	EEOC
NLRB	Federal or state court complaint alleging that the contractor violated any Labor Law provision
Any order or finding by an administrative judge, administrative law judge, or DOL Administrative Review Board, the OSHRC or state equivalent, or NLRB which states that contractor or sub has a violation of Labor laws	To be determined at a later date—violations of equivalent State labor laws. ¹⁷

These determinations are not limited to “notices or findings issued following adversarial or adjudicative proceedings...nor limited to notices and findings that are final and unappealable.”¹⁸ Instead, these are notices of complaint without the firm having the benefit of a response to a third party. This provision forces companies to report on complaints that have not been fully investigated nor had any judicial oversight. The Fifth Amendment guarantees that no person shall “be deprived of life, liberty or property, without the due process of law”¹⁹ by the federal government. By allowing federal contracts to be terminated without full judicial proceedings, the Guidance does exactly what the Fifth Amendment prohibits.

While the Department of Labor could counter that the contractors and subcontractors “may submit any additional information that they believe may be helpful in assessing the violations at issue (including the fact that the determination has been challenged),”²⁰ this argument ignores the fact that the LCA has three days to return their determination. In this situation, there may not be enough time to fully document or investigate claims by either the company or the accusing agency, or for the LCA or the contracting officer to make a fair assessment of whether the violation meets the standards to break a contract. Essentially, the contracting officer, if in the likely event the LCA cannot meet the three day threshold for a determination, must become the judge on this labor matter. The contracting officer is not suited to this position. They are

¹⁵ *Id* at 30579.

¹⁶ *Id* at 30579.

¹⁷ *Id* at 30579.

¹⁸ *Id* at 30579.

¹⁹ U.S. CONST. amend. IV.

²⁰ Proposed Guidance at 30579.

specialists in Federal contracting law, not labor law. There is a concern that it will incentivize the contracting officer to disqualify the contractor or subcontractor rather than take the risk of censure. This reporting requirement has the potential to cause work slow-downs or stoppage as these investigations compound upon one another through protests and review.

Conclusions and Recommendations

The engineering services industry is unique in how firms are established, perform time-based work, selected for the project, and work with each other. Most firms in the industry are small, specialized, and have a business plan to remain that way to assure performance and reputation. Most do not have marketing departments, and few if any, have in-house legal counsel. These factors result in the need for special considerations when trying to ensure appropriate small business participation in federal procurements.

We ask that the committee consider the following actions for the DOL and FAR Council Guidance:

- Withdraw the proposed Guidance and redraft it to better align with the current process.
- If the Guidance is not withdrawn, then DOL and the FAR Council should do the following:
 - Use the current sources of data that the Federal Government already receives
 - Limit the time of applicability to the preceding 12 months
 - Limit any triggering violations to those that have reached final adjudication

ACEC and I thank the Committee for the privilege and opportunity to address engineering and construction industry issues with current DOL and FAR Council Guidance and I am pleased to answer any questions.



STATEMENT OF DEBBIE NORRIS

VICE PRESIDENT, HUMAN RESOURCES

MERRICK & COMPANY

DENVER, COLORADO

ON BEHALF OF THE

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

PRESENTED TO THE

HOUSE SMALL BUSINESS COMMITTEE HEARING

THE BLACKLIST: ARE SMALL BUSINESSES GUILTY UNTIL PROVEN INNOCENT?

TUESDAY, SEPTEMBER 29, 2015

Good afternoon, I am Debbie Norris, Vice President of Human Resources at Merrick & Company, a federal contractor headquartered in Greenwood Village, Colorado, just outside Denver. I am pleased to be here today on behalf of the Society for Human Resource Management, or SHRM, to discuss my significant concerns with the proposed rule issued by the Federal Acquisition Regulatory (FAR) Council and guidance issued by the Department of Labor (DOL) to implement the Executive Order on Fair Pay and Safe Workplaces.

SHRM and our members have also sent comments to the FAR Council and to the DOL in response to the proposed rule and guidance. SHRM's comments were submitted in conjunction with our affiliate, the Council for Global Immigration (CFGJ) and the College and University Professional Association for HR (CUPA-HR).

Founded in 1948, SHRM is the world's largest HR membership organization devoted to human resource management. SHRM has more than 575 affiliated chapters within the United States and more than 275,000 members, a significant percentage of whom work in organizations that currently hold contracts with the federal government or seek to enter the federal contracting field.

Merrick & Company is an employee-owned company. We have been in business for over 60 years and have a broad scope of services that we provide to federal and commercial clients. Our primary federal clients are the departments of Defense, Education, Agriculture and Homeland Security; the National Science Foundation; and the U.S. Antarctic Program. In Fiscal Year 2014 we managed 329 federal contracts. Like many in the contracting community, our company serves as both a prime contractor and a subcontractor on various contracts.

Let me first make clear that the President's goal of providing fair pay and a safe workplace is a shared goal—after all, who isn't for that? In fact, as Vice President of Human Resources at Merrick, I work to provide a safe workplace and to help make us an employer of choice—not just because it is the right thing to do but because it provides us a competitive advantage in our industry. We have been recognized as a Best Company to Work for in Colorado on five different occasions. We have also been recognized nationally as a Best Firm to Work For through the ZweigWhite conference. Our internship program has been recognized as a Best Practice in the Denver Metro Area. I mention these awards because, despite the fact that my company invests significant time and resources on compliance and creating a sought-after work environment, we believe the new FAR rules will have a significant and negative impact on our ability to maintain current contracts and compete for new ones.

As a small business working in the federal contracting world, we must track a variety of employee size thresholds just to determine which federal, state, or local laws and regulations apply to us. As noted before, we not only try to be an employer of choice, but we also spend a tremendous amount of time ensuring that we are in compliance with all applicable laws. In addition, we are required to meet the current FAR requirements in all of our contracting ac-

tivities and are subject to Defense Contract Audit Agency (DCAA) audits and pricing requirements. In order to meet DCAA time-keeping requirements as well as other reporting requirements, Merrick has invested millions of dollars in a new enterprise system to track information and meet all of our federal contracting requirements. The existing standards, in which we have invested significant resources to ensure compliance, already provide the government with ample information about our fitness as a federal contractor.

The proposed regulations and guidance to implement the Executive Order on Fair Pay and Safe Workplaces raise many issues for those of us who work as contractors, especially smaller federal contractors. In my testimony today, I will address key concerns with the proposals including the role that the newly-created position of Agency Labor Compliance Advisor (ALCA) will play in the contracting process; the expansive and vague definitions used in the proposals; the burden of recordkeeping and ongoing reporting requirements; and the damage to relationships between prime and subcontractors and delay in the contracting process that will result from these proposals.

First, as described in the DOL guidance, the ALCAs will be layered onto the existing relationship between Merrick and our contracting officers in order to provide guidance on “whether contractors’ actions rise to the level of a lack of integrity or business ethics” after reviewing reported violations and assessing whether those violations are “serious, repeated, willful, or pervasive. ...” The definition of “violation” used by DOL is expansive. In addition, the DOL guidance purports to narrow that expansive definition of violation by excluding violations that are not considered “serious, repeated, willful, or pervasive.” The problem with these definitions is that they are vague as applied to specific situations. On top of what is already required by individual statutes, DOL has added these terms and definitions and given a great deal of discretion to the ALCAs to interpret these terms.

For example, under the proposed definition of “repeated,” a violation will be deemed a “repeat” violation if the violations are “substantially similar”—meaning they share “essential elements in common” but need not be “exactly the same.” Under this definition, would a Title VII claim for sexual harassment be considered a repeat violation if the contractor previously had an Office of Federal Contract Compliance Programs (OFCCP) show cause notice on a sex-based hiring discrimination claim? The definitions provide no clear guidance as to which violations and what number and type of violations could prevent an employer from contracting with the government. Contractors are left not knowing with any certainty what situations will yield a recommendation by the ALCA that a contractor lacks “integrity and business ethics” or a determination of “not responsible” by the contracting officer based on that recommendation.

In addition, ALCAs, by the nature of their duties, will be interpreting labor laws at both the federal and state levels. Assigning federal agency employees the responsibility to not only interpret

federal law but also state law is curious—particularly given the complexity of the overlapping and sometimes conflicting state and federal laws. The federal contractors who are required to interact with the ALCAs are greatly exposed when they take advice regarding legal compliance with these laws.

For example, can a contractor rely on the advice that the ALCA provides for compliance and will such reliance constitute a good-faith defense? It is unclear from the proposed regulations whether the enforcement agencies will be bound by and follow the same interpretation that the ALCAs provide. If federal contractors are not able to appeal the determinations of the ALCAs, they are unable to properly present their views to a neutral body. Small businesses, in particular, will be at risk since they are less likely to have in-house legal counsel or access to outside counsel, leaving them completely reliant on the ALCA's determination, possibly to their great detriment. I also believe that adding ALCA review and consultation with contracting officers onto the process will inevitably lead to delay in contracting, an issue I will discuss in more depth later.

I am equally, if not more concerned, about the requirement to report non-final agency actions. The proposal requires reporting of any "administrative merits determination, civil judgment, or arbitral award or decision rendered against [a federal contractor] during the preceding three-year period for violations of any of 14 identified Federal labor laws and executive orders or equivalent State laws," although which state laws are implicated by this proposal is yet undefined.

It is not uncommon for companies to undergo agency investigations and even be issued a notice of a violation that turns out to be unfounded. I am concerned that if non-final agency actions are considered by the ALCA and contracting officer as part of the responsibility determination, companies like mine could lose a contract as a result of cases or investigations that are not yet final or are eventually dismissed. For example, in fiscal year 2014, the Equal Employment Opportunity Commission received 88,778 charges. In that same year, well over half of charges filed were found to have "no reasonable cause" and less than one-half of one percent of those charges matured into lawsuits.

An unfortunate outcome of considering non-final agency actions is that federal contractors will feel pressured to settle a claim, even if they feel they have done nothing wrong. If a contractor has a big contract award coming up, it will fear that even an unfounded and unresolved issue could reflect poorly on it during the decision-making process. In our experience, government investigations and processes typically take a long time to resolve complaints or investigations.

I would like to offer one example. As a federal contractor, Merrick files an annual Equal Employment Opportunity, or EEO-1, report and Affirmative Action Plan. We are audited by the OFCCP whenever it deems necessary but not on any regular schedule. We are currently part of a desk audit that started in September 2014, and we have provided all requested documentation to

the agency. After a year, we have still not received a determination from the OFCCP.

The desk audit takes weeks of preparation and, depending on the timing of the audit, we may need to complete a mid-year Affirmative Action Plan that requires us to spend many more hours in addition to hiring a consultant for assistance working on a mid-year affirmative action plan. In the meantime, if the proposed rule were to go into effect as drafted, it is not clear to us whether this is a reportable agency action, although we strongly feel it should not be reportable. We are concerned that unresolved actions will have a negative impact on future federal contracts. For these reasons, SHRM believes that the regulations should only require the reporting of final, non-appealable adjudications.

Other major areas of concern are the recordkeeping and ongoing reporting burdens created by the proposals. Collecting and reporting on information deemed a "labor violation" under 14 different federal laws and an as-yet untold number of state laws will not be an easy task. This is compounded by the need to oversee the labor law compliance of our subcontractors. Doing so will require federal contractors to create a company-wide, centralized electronic record of federal, and eventually state, violations over the past three years. Federal contractors will also have to require their subcontractors to collect this data, as well. In addition, contractors will have to determine, in consultation with the DOL contracting officers and labor compliance officers, whether a subcontractor is a "responsible source," take remedial action when necessary, and report this information every six months.

Merrick has 18 different offices in eight states and the District of Columbia as well as offices in Mexico and Canada. We run our HR department from our headquarters in Colorado, tracking violations on a corporate-wide basis although other federal contractors do not currently keep this data in a centralized place. Even though Merrick collects the information corporate-wide, the proposal places an additional burden of ensuring that each office is accurately reporting this information to us.

Additional compliance and tracking requirements may cause my company to hire more staff, resulting in costs that will ultimately be passed on to the federal government. Currently whenever the OFCCP requests an audit, for example, it means my employees will work overtime to meet the demanding 30-day requirement to respond. When staff time is directed to responding to compliance requirements, it takes away from the HR department's focus on the needs of our employees and meeting our business objectives. Federal contractors will likely handle this situation in one of two ways: They will either try to make do with existing staff, which may result in a failure to meet the contracting obligations, or they will hire additional staff, which will end up costing the government more.

The proposed FAR regulations require an employer that has been awarded a contract to submit information on violations every six months during the life of the contract in order to determine whether to permit the contractor to continue performing. The proposed

regulations, however, do not say when this six-month reporting requirement begins or whether contractors can update the information to cover the reporting requirements for all of their contracts at the same time.

As a federal contractor, Merrick already reports information to the federal government. Rather than placing additional and duplicative data collecting and reporting requirements on federal contractors, the federal government should seek to use the data it already collects. The additional and duplicative reporting requirements we will force us to find another way to manage compliance reporting. I doubt that we will have the staff in-house to manage this and will instead have to hire additional staff to meet the requirements. While it is unlikely we will have any violations since we have not had any in the past, we still have to track and report against 14 different federal laws plus state laws that have their own set of compliance standards.

We are also concerned about the significant delays that these proposals will cause in the procurement process. Contractors will be required to report violations occurring within the previous three years along with the contract proposal, including reports on the subcontractors within their supply chain. In order to avoid jeopardizing the timeliness of their bid or proposal, prime contractors will have to start very early to collect the information needed from subcontractors. The agencies will also have to factor in time for the ALCA to review and evaluate the reports being provided by all competitors in a particular procurement, determine when to seek mitigating information, assess that information, and work with the contractor, subs, and other enforcement agencies to enter into labor compliance agreements and make recommendations. Given that each contracting agency will have only one ALCA to evaluate all of the disclosures, the process, by design, will take significant time.

When we are trying to negotiate a contract through the contracting officer, it can already take longer than anticipated to get a working contract. In the meantime, we have employees who are idle waiting to work. When these employees are not working on projects, revenue is lost to the organization.

We also believe that the information requested through the proposed rule could damage the relationships between prime contractors and subcontractors. As a company that has been both a prime and a sub on different federal contracts, we understand the burdens these proposals create for both roles. Prime contractors should not be placed in an enforcement or legal interpretation role; that should instead be handled directly between subcontractors and the government. Reporting of a labor violation could be a competitive advantage to the prime contractors and lead to blacklisting of subcontractors. On the other hand, a prime contractor will not want to do business with a subcontractor with any kind of labor violation, no matter how minor, because it could slow down the evaluation and awarding of the potential contract or jeopardize the award of the contract altogether. For these reasons, SHRM believes that the final regulations should create a process for subcontractors to

report their violations directly to the government—hopefully through a process that will not intensify delay.

In conclusion, SHRM believes that the proposals create a vague and unworkable system that will harm the federal contracting process and impose requirements on contractors and subcontractors that are impractical and hugely expensive. For these reasons, we believe the Executive Order should be withdrawn or substantially modified.

Again, I appreciate the opportunity to express my concerns with the proposed rule on behalf of SHRM and our 275,000 members. The burdens presented by the proposals are substantial. I hope that the federal government will make modifications to ensure that businesses, and small businesses in particular, can afford to remain federal contractors.



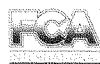
CAMPAIGN FOR QUALITY CONSTRUCTION IS COMPRISED OF:
FCA INTERNATIONAL (FCA)
INTERNATIONAL COUNCIL OF EMPLOYERS OF BRICKLAYERS AND ALLIED
CRAFTWORKERS (ICE)
MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA (MCAA)
NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION (NECA)
SHEET METAL AND AIR CONDITIONING CONTRACTORS' NATIONAL
ASSOCIATION (SMACNA)
THE ASSOCIATION OF UNION CONSTRUCTORS (TAUC)

**Statement in Support of the Fair Pay and
Safe Workplaces Executive Order 13673**

**On the Hearing of the House Committee on Small Business Subcommittees on
Contracting and Workforce and Investigations, Oversight and Regulations**

"The Blacklist: Are Small Businesses Guilty Until Proven Innocent?"

**Tuesday, September 29, 2015
Room 2360 Rayburn House Office Building**





CAMPAIGN FOR QUALITY CONSTRUCTION IS COMPRISED OF:
FCA INTERNATIONAL (FCA)
INTERNATIONAL COUNCIL OF EMPLOYERS OF BRICKLAYERS AND ALLIED CRAFTWORKERS (ICE)
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Statement in Support of the Fair Pay and Safe Workplaces Executive Order 13673

The FCA International (FCA), the International Council of Employers of Bricklayers and Allied Craftworkers (ICE), the Mechanical Contractors Association of America (MCAA), the National Electrical Contractors Association (NECA), the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA), and The Association of Union Constructors (TAUC) allied together as the Campaign for Quality Construction (CQC) all support the goals Administration's Fair Pay and Safe Workplaces Executive Order 13673 (EO) in virtually all respects. We have several suggestions for administrative implementation improvements set out below. CQC's purpose is to work with Congress and the regulatory agencies to achieve a workable set of procedures to achieve the laudable goals of the EO, raising the qualification standards in the Federal market and attracting back in top quality performers. CQC acknowledges the added complexity of the pre-award eligibility screening procedures, but supports the judgment that the aims of the policy are worthy of exploring and implementing new and innovative approaches to improve Federal market performance.

The six specialty construction employer associations in our Campaign for Quality Construction (CQC) coalition represent more than 20,000 specialty construction employers, which perform large scope construction projects in public and private construction markets nationwide. CQC firms operate as both prime contractors and subcontractors on commercial, institutional and industrial facility projects of all types, performing mechanical, electrical, plumbing, sheet metal, steel erection, equipment and tool installation, bricklaying and stone work, glazing, drywall and floor finishing, painting, architectural metal and glass installation, and interior finishing aspects of all those types of projects. CQC members operate both as prime contractors and subcontractors on direct Federal construction projects for the full range of Federal Defense and Civilian agencies. CQC employers employ the full range of skilled construction civil and building construction craft workers, including painters, plumbers, pipe fitters, hvac technicians, electricians, sheet metal workers, iron workers, boilermakers, bricklayers, cement masons, as well as carpenters, laborers, and equipment operators. Employment relations with these skilled crafts are governed through use of multiemployer collective bargaining agreements, both national and local, which also include health and welfare, defined benefit pension, and joint apprenticeship and training programs building and maintaining the high skill production craft base in the industry overall.



Bottom line: CQC respectfully contests the title of the hearing – “blacklisting” – as clearly pejorative, and unwarranted by any fair analysis of EO13673 and current regulatory safeguards. CQC suggests this title as a better description of EO 13673: ***“Serving the taxpayers well with improved Federal contract economy, efficiency, and performance through more discerning and uniform Federal prime contractor and subcontractor selection procedures.”*** Similarly, CQC respectfully submits there are no questions of innocence or guilt for small business contractors posed by EO13673 –only benefits accruing from improved competitive conditions for legally compliant small business firms – and all others too – competing in the Federal marketplace.

The EO provides more complete and uniform prime contractor and subcontractor protections in the responsibility determination process than are currently available under current Federal Acquisition Regulation (FAR) screening procedures under FAR Part 9. Employers – primes and subs have more rights, remedies and redress for non-responsibility determinations based on lack of integrity or business ethics under the EO than the current FAR procedures specifically provide. If implemented as suggested below, the EO procedures will offer even greater protections, and thereby immeasurably improve the responsibility determination process for the benefit of agency construction programs, the taxpayers, and legally compliant prime contractors and subcontractors.

The EO is sound public contract administration proprietary policy - CQC also looks forward to working closely with the Congress in this hearing and the Administration in designing implementing regulations that achieve the full intended benefits of the Order for contracting agencies and their construction projects, as well as the intended benefits for the taxpayers and the public overall by achieving superior project performance. CQC will continue to analyze and comment on EO 13673 implementation procedures to ensure that the implementation is fair to the superior and proven prime contractors and subcontractors competing to win work on Federal projects to bring those projects routinely to successful project completion.

CQC’s perspective is multidimensional – accounting for prime contractor and subcontractor roles together - Many of CQC’s member firms perform direct Federal construction projects across the country, either as prime contractors or subcontractors, at various times on different projects as one or the other, so CQC’s perspectives on Federal procurement issues are multi-dimensional. What CQC recommends for prime contractors, impacts our role as subcontractors; and similarly, what we recommend for subcontractors, our members must implement when acting as prime contractors. No other group commenting on procurement and labor policy implementation brings that multidimensional perspective as fully.

The EO promotes high workforce standards for the benefit of the public project owner – the taxpayers - CQC member firms perform jobsite construction work under collective bargaining agreements with



building trades-represented employees. Our pay, benefits, and safety practices fully address and met the goals of EO 13673. Our safety training and workforce development programs are recognized industry wide – private sector owners, such as the Construction Users Roundtable (CURT) (which includes Federal agency participation) even advocate contractor prequalification screening for adequate safety and workforce development records and programs.

CQC member firm workforce development policies, from joint training and apprenticeship programs, innovative military recruitment and on-base accelerated training programs, through to our top-flight pay, health, and pension benefit programs lead the industry. Our clients get the benefit of those high-value systems in first rate technical performance by the highly skilled professional technicians our joint labor/management apprenticeship/journeyman training systems turn out. In addition, CQC associations provide up-to-date, ongoing business administration, technology, supervisory and safety training to our member companies that also compound the performance premium that CQC member firms and their employees deliver to both public and private sector clients in the US and Canada.

The EO complements a number of other key government proprietary interests - CQC has long supported direct Federal procurement policies that raise the competitive bar in the market for Federal construction projects. CQC members firms benefit along with the Federal agencies and taxpayers when the market qualification and performance standards are high. Experienced project owners in both the public and private sectors increasingly rely on procurement policies that guard against the significant risk of contracting with marginal business partners – prime contractors and subcontractors - whose track records on legal compliance and problem-plagued jobs warrant careful screening and contracting safeguards.

CQC supports public project prevailing wage policies as a sound proprietary business judgment by public owners, and public agencies project labor agreement policies for the same reasons - the public owner's sound business judgments must be encouraged and respected. CQC has long been on record with full support of legislative and regulatory efforts to stanch the rampant abuse of misclassification of employees as independent contractors in the construction industry. Similarly, CQC was in the lead among only a few industry groups that supported a precursor of EO 13673, the Contractors and Federal Spending Accountability Act (Section 872 of the 2008 National Defense Authorization Act), which began the contractors legal compliance database that is now the Federal Awardee Performance and Integrity Information System (FAPIIS) that is key to the operation of the policies of EO 13673.

CQC was instrumental in rebutting the exaggerated claims of “blacklisting” back when the measure passed in 2008. CQC pointed out then, as it does in this statement, that EO 13673 preserves the Contracting Officer's discretion to make responsibility determinations in the exercise of the CO's best professional judgment of whether the prospective awardee is capable of performing the project as



proposed. The Contracting Officer's contracting warrant empowers the CO to make that proprietary judgment - nothing in EO 13673 changes that standard. If anything, the EO may be said to rein in that discretion somewhat by providing new review, remedies and redress for prime contractors and subcontractors whose legal compliance records may initially warrant an ineligibility determination based on lack of integrity or business ethics. The EO procedures in this respect are more permissive for firms that would question an initial ineligibility determination. In that sense, the EO provides transparency and uniformity where it does not now fully exist in FAR Part 9 procedures. Taken in that light, the EO can be characterized as the antithesis of a blacklisting provision. Similarly, the specific list of legal compliance review items is no more expansive than current FAR procedures permit for business ethics and legal compliance integrity eligibility determinations. While it is true that the 6-month updated certification requirement is new – it too might be fairly characterized as sound proprietary contract administration vigilance.

In summary, CQC does not presume that Contracting Officers are predisposed to abuses of issuing unwarranted non-responsibility determinations. If anything, the record of past reports shows that haste in making awards has led to overlooking problematic performance records. The CO's mission is to successfully complete the project – the EO should be interpreted to be in entire accord with that aim. If anything, the EO should be characterized as adding Labor Compliance Advisor reviews to guard against unwarranted ineligibility determinations. Also, a fair assessment of the EO would grant that it is much in line with best practices in the private sector, where private sector project owners are careful to prequalify top performing firms on the basis of contract and legal compliance performance backgrounds. To the extent possible, EO 13673 would have direct Federal agencies exercise the same proprietary contract eligibility judgments that are routine in the private sector.

Finally, CQC, along with many other industry groups, has long condemned the practice of post-award subcontract bid shopping and bid peddling on public contract awards, and has long sought implementation of a simple and proven sub bid listing procedure on direct Federal contractor selection procedures to guard against the unethical practice of post-award bid shopping and peddling that all too frequently impairs successful project completion. So, in this sense, with the recommendations below on consolidating the subcontractor eligibility screening process at the time of prime contract award, the EO would also promote a sound and proven subcontractor pre-award naming procedure as a way to better ensure successful implementation of the EO.

CQC comments on regulatory approaches to ensure full effectiveness of the EO policy - CQC's experienced construction project professionals, who have experience as both primes and subcontractors – have reviewed EO13673 and are in full support of its aims and purposes, and are eager to provide their expertise and analysis in helping to propose implementing procedures that achieve the intended purposes of the EO – to raise the competitive bar in the Federal marketplace for the benefit of the government and the taxpayers.



To fully achieve the primary purpose of the EO's main procedure, to carefully and effectively screen the legal compliance records of prospective prime contractors and subcontractors, some innovative approaches should be considered fully in line with existing Federal Acquisition Regulatory policy: in FAR Part 1, promoting Acquisition Team contracting with superior performance teams and conducting business with integrity, fairness and openness (FAR Part 1.102); in FAR Part 3's emphasis on contractor business ethics, and proscriptions against contractor's buying in to contracts; and FAR Part 9, reservation of contracting officer discretion to make independent subcontractor responsibility determinations.

CQC recommends a regulatory approach that would consolidate the legal compliance screening process for both prime contractors and subcontractors in Section 2 of the EO - The EO requires the

prime contractor to make the legal compliance representation/certification to the Contracting Officer in the post-award responsibility determination process, and then to flow down that requirement so that prime contractors require the parallel representation/certification from covered subcontractors to the prime contractor before award of each subcontract under a covered prime contract. The EO says the Labor Compliance Advisor (LCA) shall be available, where appropriate, to assist the prime contractor in assessing subcontractor certifications. We suggest that this process may present some risks to successful project performance that can be avoided in regulations. The problem is that subcontractors who are awarded subcontracts in the middle or late stages of the project may not qualify, necessitating substitutions mid project or later, with the risk of project delays and perhaps claims for increased costs because of the late ineligibility determination. Unscrupulous prime contractors might misapply the eligibility criteria in order to change originally accepted subcontract prices or terms. Also, there is the question of uniformity of application of criteria if the primes are exercising judgments that are not in line with the agency LCA standards, and there are project ramifications because of that variation. The EO says only the LCA shall be available to the prime to help with its responsibility determination of the subcontractor – it's not required. Similarly, the discipline of reporting accuracy may be different when subcontractors are making representations to the prime contractor, as compared with when the prime contractor is making representations to the contracting officer. If False Claims Act discipline applies to the prime contract representations but not the subcontractor representations, then there also may be negative project consequences that could be avoided if regulations were to require all representations to be made to the agency. This would avoid any risk there might be of vicarious liability on the prime contractor for inaccurate subcontractor representations, or inconsistent application of legal compliance evaluation criteria. Moreover, this would provide equitable and equal protection for prime contractors and subcontractors, in those instances where courts and contract bid protest authorities allow businesses that are denied public contracts on the basis of a lack of integrity or business ethics some due process protections in challenging those adverse determinations.



Adopt proven public contracting regulatory approaches to stem persistent bidding abuses and fully and consistently implement the objectives of EO 13673 - The regulatory approach that would help avoid these issues would be to require covered subcontractor naming on all manner of direct Federal prime contractor selections procedures – FAR Part 14 low-bid selections, FAR Part 15, negotiated trade-off, and low-price/technically-acceptable (LPTA) procedures, and multiple award task order (MATOC) and indefinite delivery/indefinite quantity (IDIQ) contracting vehicles. So, if the apparently successful offeror/bidder prime contractor had to list/name the major covered subcontractors in its successful bid/offer, then the Contracting Officer could evaluate both the prime and the covered subcontractors in the initial responsibility determination process. The LCA could be deployed at one time to ensure uniform application of eligibility criteria for all performing contractors on the project. The prime contractor would be relieved of the burden of applying the technical and legalistic evaluation of all covered subcontractors, and thereby would avoid question of fairness and liability for mistakes in that evaluation of the subcontractors. The subcontractor certification would be made to the agency and not the prime contractor. The False Claims Act discipline would be the same for all performing contractors on the project. The regulations would have to make necessary accommodations for late performing subcontractors who incur disqualifying events in the time between the initial responsibility determination and the time of the award of the subcontract, but the earlier eligibility screening for all would help avoid otherwise detectable surprise disqualifications later in the project. Contract equitable adjustments would have to be made in the event the prime is not responsible for a late and warranted subcontractor ineligibility determination.

Other aspects of EO 13673; independent contractor classification notices – CQC also supports the laudable aims of the Executive Order seeking to stem worker misclassification. Rampant misclassification of employees as independent contractors is the scourge of fair competition in the construction industry and lead to abuses under other laws in both public and private sector markets. The Order's notice provisions are good, but just one step among many more needed to address the serious abuse of worker misclassification for the overall benefit of the industry, public and private owners, and the taxpayers generally.

Attachments:

Campaign for Quality Construction Comments on EO13673 to the FAR Council and Labor Department, August 26, 2015, and

Mechanical Contractors Association of America (MCAA) letter to the Secretary of Labor and Director of Office of Management and Budget on implementation of EO13673, April 21, 2015



General Services Administration
Regulatory Secretariat (MVCB)
Attention: Ms. Flowers
1800 F Street, NW
Washington, DC 20405
FAR Case 2014-025

Ms. Tiffany Jones
U.S. Department of Labor
S-2312
200 Constitution Avenue, NW
Washington, DC 20210
ZIRN 1290-ZA02

August 26, 2015

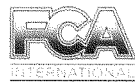
Subject: Comments on Executive Order 13673, Fair Pay and Safe Workplaces (79 FR 45309, August 5, 2014) to GSA on proposed Federal Acquisition Regulations at 80 FR 30548, May 28, 2015, and Proposed Labor Department Guidance on EO13673 at 80 FR30574, May 28, 2015 (Submitted by mail and by e-mail through www.regulations.gov)

Dear Ms. Flowers and Ms. Jones:

Following are comments on the proposed regulations and guidance on Executive Order 13673 published by your respective agencies on May 28, 2015.

These comments are filed on behalf of a coalition of national construction employer associations, called the Campaign for Quality Construction, which is comprised of: FCAInternational (FCA), the International Council of Employers of Bricklayers and Allied Craft Workers (ICE-BAC); the Mechanical Contractors Association of America (MCAA); the National Electrical Contractors Association (NECA); the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA); and The Association of Union Constructors (TAUC)

The six specialty construction employer associations in our Campaign for Quality Construction (CQC) coalition represent more than 20,000 specialty construction employers, which perform large scope construction projects in public and private construction markets nationwide. CQC firms operate as both prime contractors and subcontractors on commercial, institutional and industrial facility projects of all



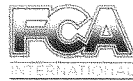


types, performing mechanical, electrical, plumbing, sheet metal, steel erection, equipment and tool installation, and painting, architectural metal and glass and interior finishing aspects of all those types of projects. CQC members operate both as prime contractors and subcontractors on direct Federal construction projects for the full range of Federal Defense and Civilian agencies. CQC employers employ the full range of skilled construction civil and building construction craft workers, including painters, plumbers, pipe fitters, hvac technicians, electricians, sheet metal workers, iron workers, boilermakers, bricklayers, cement masons, glaziers, drywall and flooring finishers, as well as carpenters, laborers, and equipment operators. Employment relations with these skilled crafts are governed through use of multiemployer collective bargaining agreements, both national and local, which also include health and welfare, defined benefit pension, and joint apprenticeship and training programs building and maintaining the high skill production craft base in the industry overall.

CQC comments are aimed at helping the FAR Council and DoL to establish a tenable and workable construction prime contractor and subcontractor responsibility screening process that improves competition for Federal construction projects, and increases the likelihood of successful project completions for Federal agency programs and for the direct benefit of the taxpayers. CQC has identified a number of key elements for changes to the proposed regulations that are necessary for EO13673 to achieve its stated goals, as enumerated below.

1. **The legal compliance assessment of all covered construction prime contractors and subcontractors must be conducted by the government agency – the Labor Department and the agency Labor Compliance Advisor (LCA) in collaboration in some fashion, with the ultimate decision making responsibility and discretion continuing to reside in the Contracting Officer's warrant to make affirmative responsibility determinations. The legal compliance assessment of the prime contractor and all covered subcontractors also should all be performed at the same time in the pre-award responsibility determination phase of the project – not at the time of subcontract execution.**

CQC submits that the optional approach adopted in the proposed regulations to allow the prime contractor discretion to require covered subcontractors to submit their legal compliance certifications to the Labor Department for review should be made mandatory for construction contracts for all covered subcontractors (first tier and lower tier subs). The prime also should not be allowed to delegate flow-down certification review to subcontractors for them to assess the legal compliance of lower tier





subcontractors. And, the DoL assessment of all covered subcontractors should be performed at the same time as the assessment of the prime contractor – in the pre-award responsibility process to minimize the impact of ineligibility decisions coming later in the project – disrupting successful project completion and increasing chances for project delay, claims, cost overruns and disputes. The subcontractor naming and review process likewise would apply to all contractor selection methods – low-bid, competitive negotiations trade-off methods (best value), low-price/technically acceptable (LPTA), and indefinite delivery/indefinite quantity (IDIQ), and, multiple award task order contracting methods (MATOC).

The reasons for this necessary change are many. We agree with the Congressional comments asserting that the legal compliance assessments of both primes and subs are an inherently governmental function (House of Representatives comments, page 2). We also agree with comment that the legal compliance assessment and mediation between arms-length business partners in an ordinary commercial contracting context is wholly inappropriate (Jenner & Block comments, page 21.). Furthermore, the proposed attenuated, flow-down legal compliance assessments throughout the time schedule of the project is rife with opportunities for inconsistent application of the very complex legal standards in the DoL proposed guidance. If primes were allowed to assess subcontractors throughout the course of the project at the time each successive subcontract is signed, and then also were allowed to delegate that assessment to subs to assess their covered lower tier subcontractors, the opportunities for inconsistent application of the EO standards, and for other mischance, mistakes and misapplication, and consequent project claims, delays, cost increases and other disputes would abound. Similarly, the risks of opportunistic post-award price or other subcontract term and conditions renegotiations in the legal compliance review process also can't be discounted.

Consolidated agency review of all covered firms at the beginning of the process also would bring uniform False Claims Act discipline to the certification process at all contracting tiers. Moreover, because the proposed regulations currently put the legal compliance assessment risk and burden on primes and subcontractors, they may be counterproductive to the aims of EO13673, and have the effect of driving competitors out of the market, fearing claims, disputes, and potential liability for either challenged stringent or lax application of the hyper complex legal judgments called for in the Labor Department Guidance. Some number of otherwise well qualified and responsible firms may abjure competing for Federal projects altogether, as either primes or subs, wanting to stay out of the legal business and focus on their business strengths – building projects.





We should note that construction project supervision and contracting personnel are not trained in law, most often they are former skilled craft workers and project engineers and estimators – builders in one way or another – not lawyers, by choice. One need only skim through the proposed Labor Department guidance to fully apprehend the impossibility of achieving consistent EO13673 standards relying on field supervision assessments. It is immediately apparent that construction project contracting personnel are wholly ill-equipped to assess whether another company's Title VII adverse impact violations are disqualifying under EO13673 standards, or how to discern culpable Title VII workplace harassment from every day jobsite horseplay or shop talk. The legal case reporters themselves are replete with examples of even judges having difficulty mastering the intricacies of Title VII Uniform Guidelines of Employee Selection Procedures and how to assess the disqualifying potential of a serious or not- so- serious employment screening adverse impact claim or violation. It is patently contrary to the goal of consistent application called for by Section 4 of EO13673 to ask private sector project superintendents/engineers or any other private sector contracting personnel to make the hyper legalistic governmental judgments called for in the DoL proposed Guidance.

The support for revising the proposed regulations to require the Labor Department and LCA to assess both the prime and covered subs in the pre-award responsibility determination process can be grounded in the terms of EO13673, as well as other aspects of the proposed regulations calling for comments on how to reduce the burden of the EO on business and small business. Certainly, having the government accept the burden of applying the Labor Department guidance would be a big relief to both primes and subs, and achieve the aim of consistency called for in the terms of the EO itself in Sections 4 and 7.

Moreover, other provisions of the Federal Acquisition Regulations strongly support this necessary change to the proposal, primarily FAR Part 9.104-4(b) - "When it is in the Government's interest to do so, the contracting officer may directly determine a prospective subcontractor's responsibility (e.g., when the prospective contract involves medical supplies, urgent requirements, **or substantial subcontracting**). In this case, the same standards used to determine a prime contractor's responsibility shall be used by the Government to determine subcontractor responsibility." [Emphasis added]

It should be noted that most construction contract project awards of any significant scope involve a predominate scope of the project let out in subcontract awards – satisfying the parenthetical example in FAR Part 9.104-4(b) entirely.





Also, the proposed FAR rule Regulatory Flexibility analysis on this point is somewhat misleading. On the subcontractor flow-down reporting on page 30563, seemingly dismissing the efficacy of having the Labor Department assess the subcontractors legal compliance, the analysis says: “Another alternative would be to have the subcontractor report the information to DoL and inform the prime. However, the prime has to make a subcontractor responsibility determination and without this information may not be able to complete their analysis for the determination.”

That statement overstates the requirements of the FAR in Part 9.104-4(a), which says only that: “**Generally**, prospective prime contractors are responsible for determining the responsibility of their respective subcontractors (but see 9.405 and 9.405-2 regarding debarred, ineligible or suspended firms). Determinations of prospective subcontractor responsibility may affect the Government’s determination of the prospective prime contractor’s responsibility. A prospective contractor may be required to provide written evidence of a proposed subcontractor’s responsibility.” [Emphasis added]

Taken on its face, FAR Part 9.104.4 (a) is a rather permissive, “general” statement that a prime has responsibility for qualifying its subcontractors – it is not a hard-and-fast, specific requirement as the regulatory analysis seems to suggest. And, in any case, having the CO/LCA provide the legal compliance screening would not necessarily interfere with any other type of responsibility screening the prime may conduct of subs – if it chooses to do so.

Other provisions in the FAR too may support the consolidated pre-award agency legal compliance screening of primes and subcontractors. For example, FAR Part 1 often is cited for the premise that practices that are not specifically prohibited in the FAR are permissible for agencies. And, there may be other direct examples of prime and subcontractor screening by other agencies, for example, the Office of Federal Contract Compliance Programs (OFCCP) pre-award screening of prime contractor and subcontractor compliance with EO11246 affirmative action requirements.

As to common objections to the type of agency screening called for above, several are typical and unpersuasive in the context of EO13673. The proposed rules, in currently reserving an option for the prime to direct the subcontractor to deliver the certification to DoL and then have the subcontractor report the DoL recommendation back to the prime would seem to be some indirect deference to the time-worn concept of privity of contract. That conceptual restraint is typically now observed in the breach in many ways in advanced public construction contracting methods, with BIM modeling,





integrated project delivery contracting methods combining all firms in a collaborative contracting model, prime and subcontract teams selection and many other examples, including the highly evolved Federal contract subcontract payment clause too serving as examples of “privity” constraints being removed to improve contracting performance. (See, *Integration at its Finest: Success in High-Performance Building Design and Project Delivery in the Federal Sector*, U.S General Services Administration, Office of High – Performance Green Buildings, Research Report April 14, 2015.) Also, there is a consensus that public agency prequalification of primes and subcontractor does not contravene requirements of full and open competition. (See, *Fair Pay and Safe Workplaces Executive Order: Questions and Answers*, Congressional Research Service, 7-5700, July 15, 2015, citing Ralph C. Nash, Jr., *Prequalification: Can it Be Used to Improve the Procurement Process*, 10 Nash & Cibinic Report Sec 16, April 1996 – “[The Competition in Contracting Act] provisions here have generally been seen to limit (although not prohibit) the use of prequalification by federal agencies.”) In summary, prequalification of prime contractors and subcontractors in the private sector and public agencies outside the Federal sector are in fact very common – legal compliance reviews are routinely a part of those prequalification rating systems. See, *Prequalification of Contractors by State and Local Agencies: Legal Standards and Procedural Traps*, American Bar Association, Construction Lawyer, Vol. 27, No. 2. Spring 2007.) For sure, there are significant differences between a prequalification process, and responsibility determination reviews of successful bidders/offers, but the establishment of the dedicated GSA website for this process is a start of melding the two. The scope of that work for a purchasing system as vast as the U.S Government is challenging, but altogether necessary, and would almost certainly be cost effective in spurring significant improvements in competition for Federal projects and promoting more consistent successful project completions.

2. Support for paycheck transparency provisions.

The CQC supports the paycheck transparency provisions of the EO13673 as they pertain to notices to independent contractors. This is entirely in line with CQC’s long held policy views and initiatives to stem worker misclassification in the construction industry, which has become the bane of fair competition in the industry in public and private sector that must be addressed in a variety of ways, including actions such as EO13673.

3. The proposed regulations should clarify that the prime contractor’s legal compliance certification is required after it wins the contract selection competition, not in its initial offer.

EO13673 by its terms (Section 2) requires agency solicitations to notify offerors that they will be





required to make legal compliance certifications in the pre-award process (which usually means the contractor responsibility determination process), that is, after successful competition for the contract award. However, the proposed regulations (Subsection 22.2004-1) interprets this to mean that offerors must provide the legal compliance certification earlier, that is, with their initial offer, before they win the project. As that may risk the impartiality of the negotiated selection process because of an early indication of legal issues entering into the selection/competitive negotiations decisions, the regulation should be amended so that the certification should be required only after completion of the competition for contract award in the responsibility determination review of the successful offeror or low bidder. While this may not currently be the practice with respect to the other contractor responsibility certifications under FAR Part 9-104-5 and Part 52.209-5, it may still be appropriate for legal compliance certifications to be collected post offer, as provided in FAR Part 9.105-1.

4. The definition of “administrative merits determinations” should be pared back to include only final agency determinations; arbitral award definition should be clarified.

Paring back the “administrative merits determinations” to include only final agency decisions (removing initial NLRB unfair labor practice complaints, and EEOC right to sue letters, for example) would achieve a more equitable assessment of contractor and subcontractor responsibility, on proven records, improving the operation and durability of the EO, and diminishing the attacks on the fairness of the concept, without substantially impairing the goals of the EO, which is culling out truly non-responsible firms based on their established records. Similarly, the EO should clarify that arbitral decisions bearing on collective bargaining issues that don’t amount to statutory violations should be expressly excluded for reporting and LCA/CO consideration. Arbitrator awards pertaining to ordinary collective bargaining agreement terms and conditions disputes are not the types of violations that denote any integrity or business ethics issues – and merely reflect good faith disputes about how to implement complex labor agreement working terms and conditions by workforce supervision at the jobsite.

5. Expand and clarify Contracting Officer possible responses to LCA recommendations.

The provisions of the scope of possible Contracting Officer responses to the Labor Compliance Advisor’s recommendations pertaining to a prime contractors compliance review in proposed pre-award (subsection 22.2004-2 (b)(4), and post-award (subsection 22.2004-3(b)(4) procedures), and parallel provisions relating to prime contractor reviews of subcontractors records (in the event the final regulations continue to reflect the flawed flow-down process argued against in Point 1 above), should be expanded to include an optional response of the CO to an adverse LCA recommendation to permit an award to the firm despite the LCA’s negative assessment. The current list of CO response options says





the response actions may include certain negative actions in response to a negative LCA recommendation, but it is only weakly implied that the Contracting Officer retains business interest proprietary discretion to make a positive responsibility determination over an adverse LCA recommendation. The new provision should give greater weight to the discretion the Contracting Officer currently has to make a judgment in the Government's best interest, based on objective criteria, such as satisfactory past performance in spite of some legal compliance issues, if justified in writing by the Contracting Officer to be in the government's best interest based on verifiable objective criteria. There is no express term in Executive Order 13673 that would override the Contracting Officer's discretion to act contrary to the recommendation of the LCA if it is in the Government's interest to do so.

Respectfully submitted on behalf of the Campaign for Quality Construction, comprised of:

- FCAInternational (FCA)
- International Council of Employers of Bricklayers and Allied Craft Workers (ICE-BAC)
- Mechanical Contractors Association of America (MCAA)
- National Electrical Contractors Association (NECA)
- Sheet Metal and Air Conditioning Contractors' National Association (SMACNA)
- The Association of Union Constructors (TAUC)





April 21, 2015

The Honorable Thomas E. Perez
Secretary
US Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

The Honorable Shaun Donovan
Director
Office of Management and Budget
725 17th Street, NW
Washington, DC 20530

Subject: Construction industry groups' support for regulatory implementation of Executive Order 13673

Dear Secretary Perez and Director Donovan:

On April 15, 2015 the Ranking Members of the House Committee on Education and the Workforce and the Committee on Oversight and Government Reform, Representative Robert C. Scott and Representative Elijah E. Cummings respectively, wrote a letter to you urging expeditious regulatory implementation of the Administration's Fair Pay and Safe Workplaces EO13673. That letter referenced the support of the Mechanical Contractors Association of America (MCAA) for the policy aims underlying the EO, and the accompanying Congressional press release also highlighted the backing of several other construction industry associations.

Attached below is a statement for the record that MCAA and the other groups that support EO13673, combined in an alliance called the Quality Construction Alliance, submitted for the record of the hearing conducted by the Committee on Education and the Workforce on February 25, 2015. In the statement, the QCA groups express support for the policy aims of EO13673, and note some necessary regulatory changes in the Federal Acquisition Regulations pertaining to prime contractor and subcontractor responsibility determination procedures to make sure the EO is implemented most effectively.

In summary, QCA recommends that the legal compliance certification review for both prime contractors and major subcontractors be conducted by the Contracting Officer (CO) and Labor Contract Advisor (LCA) at the same time in the prime contract FAR Part 9 pre-award responsibility determination process for either FAR Part 14 low-bid selections, or FAR Part 15 negotiated selection decisions for construction project awards. Specifically, QCA recommends using the existing policy of FAR Part 9-104-4(b) permitting CO review of the subcontractor's responsibility when it is in the Government's interest to do so.

There is ample policy authority to allow OMB/OFPP to make the regulatory changes requiring CO/LCA review of major subcontractor legal compliance certifications in the Government's interest of effective implementation of EO13673. As the QCA statement points out, the current flow-down scheme, requiring an attenuated eligibility screening process by the prime of all subs at the time of subcontract awards, is rife with the potential for misapplication of the standards by the prime contractor, and then late ineligibility determinations and subcontractor substitutions, with attendant claims, disputes, and project delays, and cost overruns. Moreover, the flow-down eligibility screening process presents too many opportunities for post-award renegotiation of



subcontract price and other terms and conditions of performance in the legal compliance review discussions, all to the detriment of successful project completions and the taxpayers' interest in reducing project delays, disputes, claims, and post-award cost increases and cost overruns.

MCAA and the QCA support the aims and purposes of EO13673, as we believe high legal compliance standards in the market for direct Federal construction prime contracts and subcontracts will attract back in quality providers who will perform contracts successfully because of their respect for full legal compliance in project execution. But, in order to achieve that laudable aim, the regulatory procedures must anticipate some obvious problems and exercise regulatory prudence in adopting new and proven prime contractor and subcontractor selection procedures that also will advance the aims of EO13673.

The QCA statement also emphasizes that our members who often perform as prime contractors as well will benefit by the consolidated CO/LCA review of both the prime and major subs at the same time and in the same procedure. With this consolidated agency review, the prime contractor can avoid the liability for claims and disputes relating to the misapplication of the eligibility screening criteria on a pass-through basis, either for misapplication of the criteria in a permissive way or suffering claims and disputes relating to a challenged subcontractor ineligibility determinations. In that way, the project will benefit by the elimination of disputes, and the Government will be able to more readily establish uniform application of the legal compliance eligibility criteria on an agency-wide basis.

Thank you for considering the policy recommendations of the QCA in the interest of achieving the full construction project performance gains envisioned by the Government's sound proprietary policy aims underlying EO13673. Please contact me if you have questions pertaining to the QCA recommendations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John McNerney". The signature is fluid and cursive, with a prominent "J" and "M".

John McNerney, General Counsel
MCAA

Attachment: [Statement in Support of the Fair Pay and Safe Workplaces Executive Order 13673](#)

cc:

The Honorable Robert C. Scott, Ranking Member, House Committee on Education and the Workforce, and

The Honorable Elijah E. Cummings, Ranking Member, House Committee on Oversight and Government Reform

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503
www.whitehouse.gov/omb

TESTIMONY OF ANNE E. RUNG
ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE SUBCOMMITTEE ON CONTRACTING AND
WORKFORCE AND
INVESTIGATIONS, OVERSIGHT, AND REGULATIONS
COMMITTEE ON SMALL BUSINESS
UNITED STATES HOUSE OF REPRESENTATIVES

September 29, 2015

Chairman Hanna, Ranking Member Takai, Chairman Hardy, Ranking Member Adams and Members of the Subcommittees, thank you for the opportunity to appear before you today and discuss the Administration's implementation of Executive Order (E.O.) 13673, Fair Pay and Safe Workplaces. My comments today will primarily focus on actions being taken by the Federal Acquisition Regulatory Council (FAR Council), which I chair as Administrator of the Office of Federal Procurement Policy (OFPP).

It is important to emphasize at the outset that OFPP and the FAR Council have been working in close partnership with the Department of Labor (DOL) on rules and guidance to implement E.O. 13673. Our respective organizations are fully committed to implementing the E.O. in a manner that is clear, fair, and effective, and have been actively seeking feedback from stakeholders since issuance of the E.O. more than a year ago. We did this to ensure that we had sufficient information and insight from stakeholders, including small businesses, to achieve these goals. As part of this outreach, my office took part in a roundtable held this summer by the Small Business Administration's (SBA) Office of Advocacy to hear the small business's views on DOL's proposed guidance and the proposed change to the Federal Acquisition Regulation (FAR) published in the Federal Register on May 28, 2015.

E.O. 13673 is designed to improve contractor compliance with labor laws in order to increase economy and efficiency in Federal contracting. As section 1 of the E.O. explains, contractors that consistently adhere to labor laws are more likely to have workplace

practices that enhance productivity and deliver goods and services to the Federal Government in a timely, predictable, and satisfactory fashion. While the vast majority of Federal contractors abide by labor laws, studies conducted by the Government Accountability Office, the Senate Health, Education, Labor and Pensions Committee, and the Center for American Progress (CAP) suggest that a significant percentage of the most egregious labor violations identified in recent years have been regarding companies that received Federal contracts. In addition, CAP and studies performed by others have found a nexus between companies with labor violations and significant performance problems on Government contracts.

In recent years, important steps have been taken by this Administration to better protect taxpayers from the waste and abuse that comes from doing business with contractors that are not responsible sources. These steps include the deployment of the Federal Awardee Performance and Integrity Information System (FAPIIS) that supports agencies as they evaluate whether a company has the requisite integrity to do business with the Government. We have also sought to strengthen agency suspension and debarment programs to protect the Government from harm. Despite these steps, many labor violations that are serious, willful, repeated, or pervasive are not considered in awarding a contract, in large part because contracting officers are not aware of them. In addition, even if information regarding labor violations is made available to the agency, contracting officers generally lack the expertise and tools to evaluate the severity of the labor law violations brought to their attention and therefore cannot easily determine if a contractor's actions show a lack of business ethics and integrity.

The E.O. requires that prospective and existing contractors on covered contracts disclose violations of certain labor laws and that contracting officers, in consultation with labor compliance advisors (LCAs), consider the disclosure, including any mitigating circumstances, as part of their decision to award or extend a contract. DOL and the FAR Council have been working closely together to create a comprehensive process that is manageable and avoids the uncertainty that drives up the cost of contractors doing business with the government. Once finalized, the FAR rule will provide direction to contracting officers on how they are to obtain disclosures from contractors on their labor violations, how to make responsibility determinations that take into account disclosed labor violations, and how they will work with LCAs, who will advise contracting officers in evaluating violations. DOL's guidance will work hand-in-hand with the FAR rule by addressing how LCAs should identify from among disclosed violations those serious, willful, repeated, or pervasive violations that may warrant heightened attention because of the nature of the non-compliance. The guidance will also explain how contractors can obtain compliance assistance from DOL.

In addition to the new requirements to improve labor compliance, the FAR rule will address requirements in the E.O. to ensure workers on covered contracts are given the necessary information each pay period to verify the accuracy of what they are paid. It will also require that contractors and subcontractors who enter into con-

tracts for non-commercial items over \$1 million agree not to enter into any mandatory pre-dispute arbitration agreement with their employees or independent contractors on any matter arising under Title VII of the Civil Rights Act, as well as any tort related to or arising out of sexual assault or harassment.

As explained in the preamble to the proposed FAR rule, we have taken a number of steps in the proposed rule, consistent with direction in the E.O., to minimize the implementation burden for contractors and subcontractors, including small businesses:

- The proposed FAR rule builds on existing processes and principles, including the long-standing requirement that a prospective contractor be a responsible source that has a “satisfactory record of integrity and business ethics.”
- Many of the contracts performed by small businesses, including contracts valued at \$500,000 or less and subcontracts for commercial-off-the-shelf items, are exempt from the proposed FAR rule’s disclosure requirements.
- The proposed FAR rule preserves and emphasizes the requirement in the FAR that if a contracting officer finds a prospective small business contractor to be nonresponsible, the matter shall be referred to SBA. If SBA concludes that the small business is responsible, SBA will issue a Certificate of Competency.
- The focus of the proposed FAR rule is on the most problematic labor violations that are most likely to have the greatest bearing on an assessment of a contractor or subcontractor’s record of integrity and business ethics.
- LCAs will provide labor expertise to support contracting officers in evaluating labor violations.
- DOL will work with LCAs to coordinate evaluations to promote consistency and certainty.
- Efforts are underway to develop a single website to centralize reporting of labor violations by contractors.

Further, during listening sessions held by DOL, OMB, and relevant policy councils, stakeholders raised concerns regarding the potential complexity and burden associated with two aspects of the E.O. in particular: (1) provisions addressing disclosure of violations of equivalent State laws, and (2) provisions addressing disclosure and evaluation of subcontractor violations. In response to what we learned from these sessions, requirements in the E.O. addressing the disclosure of violations of equivalent State laws, with the exception of OSHA State Plans, will be phased in at a later date. In addition, the FAR Council has developed alternative proposals that seek to address concerns it heard regarding the challenges contractors might face in evaluating violations disclosed by their subcontractors. This includes a possible phase-in of subcontractor disclosure requirements. The proposed FAR rule has invited public comment on additional or alternative approaches to this issue.

Stakeholder feedback has been a key component in the development of the proposed FAR rule. Currently, the FAR Council is carefully reviewing the many and diverse public comments received in

response to the proposed rule published at the end of May to determine where additional revisions are needed. In considering comments, the FAR Council seeks to ensure that the final rule is both manageable and impactful in achieving the E.O.'s objective of bringing contractors with significant labor violations into compliance with the law in a timely manner.

Without question, implementation of the E.O. requires the Government's policy, operational, and technology officials to address a number of difficult issues head on. It is hard work, but work that is critical to the integrity of our procurement system, ensuring economy and efficiency in contracting, and securing the well-being of American workers.

Thank you and I am happy to answer any questions you may have.

Statement of
Lafe Solomon
Senior Labor Compliance Advisor, Office of the Solicitor
U.S. Department of Labor
before the
Subcommittee on Investigation, Oversight and Regulations &
Subcommittee on Contracting and Workforce
Committee on Small Business
U.S. House of Representatives
September 29, 2015

Good morning Chairmen Hardy and Hanna and Ranking Members Adams and Takai. Thank you for the invitation to appear before your Subcommittees to speak about the Department of Labor (DOL or the Department) proposed guidance to implement Executive Order 13673, the Fair Pay and Safe Workplaces Executive Order (EO or the Order).

Although most Federal contractors comply with applicable laws and provide high-quality goods and services to the government and taxpayers, a small number of Federal contractors have committed a significant number of labor law violations in the last decade. In 2010, the Government Accountability Office issued a report that found that almost two-thirds of the 50 largest wage-and-hour violations and almost 40 percent of the 50 largest workplace health-and-safety penalties issued between Fiscal Year (FY) 2005 and FY 2009 occurred at companies that later received government contracts.

Beyond their human cost, these violations create risks to the timely, predictable, and satisfactory delivery of goods and services to the Federal Government, and Federal agencies risk poor performance by awarding contracts to companies with histories of labor law violations. Poor workplace conditions lead to lower productivity and creativity, increased workplace disruptions, and increased workforce turnover. For contracting agencies, this means receipt of lower quality products and services, and increased risk of project delays and cost overruns. Contracting agencies can reduce execution delays and avoid other complications by contracting with contractors with track records of labor law compliance—and by helping to bring contractors with past violations into compliance. Contractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and deliver goods and services to the Federal Government in a timely, predictable, and satisfactory fashion.

Moreover, by ensuring that its contractors are in compliance, the Federal Government can level the playing field for contractors who comply with the law. Those contractors who invest in their work-

ers' safety and maintain a fair and equitable workplace should not have to compete with contractors who offer slightly lower bids—based on savings from skirting labor laws—and then ultimately deliver poor performance to taxpayers. By helping contractors improve, the Federal Government can ensure that taxpayers' money supports jobs in which workers have safe workplaces, receive the family leave they are entitled to, get paid the wages they have earned, and do not face unlawful workplace discrimination.

To address this issue, President Obama signed this EO last year, requiring prospective Federal contractors on covered contracts to disclose certain labor law violations and giving agencies more guidance on how to consider those labor violations when awarding Federal contracts. With this Order, the President pledged to hold accountable Federal contractors that put workers' safety, hand-earned wages, and basic workplace rights at risk.

The EO builds on the existing procurement system, and changes required by the Order fit into established contracting practices that are familiar to both procurement officials and the contracting community. In addition, the Department will provide support directly to contractors and subcontractors so that they understand their obligations under the Order and can come into compliance with Federal labor laws without holding up their proposals in response to specific Federal contracting opportunities. Finally, the Department will work with Labor Compliance Advisors across agencies to minimize the amount of information that contractors have to provide and to help ensure efficient, accurate, and consistent decisions across the government.

Nothing in the Order displaces the existing authority of the Small Business Administration to make a definitive determination of a small business's responsibility to perform a particular contract. If a contracting officer makes a determination on non-responsibility involving a small business apparent successful offeror, the contractor must be given the opportunity to apply to the Small Business Administration for a "certificate of competency." If SBA grants the certificate of competency, SBA's determination overrides the responsibility decision made by the contracting officer—even a decision made pursuant to this Order.

The objective of the Order is to help contractors come into compliance with Federal labor laws, not to deny them contracts, and it encourages compliance, not suspension and debarment. The processes and tools envisioned by the Order are designed to identify and help contractors address labor violations and come into compliance before consideration of suspension and debarment. The Order does not in any way alter the suspension or debarment process; however, the expectation is that the processes and tools envisioned by the Order will drive down the need for an agency to consider suspension and debarment and help contractors avoid the consequences of that process. As a result, this Order, once implemented, will offer contractors an opportunity to come into compliance and maintain the privilege of being a Federal contractor, unlike the suspension and debarment process, which could exclude them from receiving awards.

The Order also ensures that contractors' employees are given necessary information to make sure their paychecks are accurate. It also ensures that more workers who may have had their civil rights violated or been sexually assaulted can have their day in court.

On May 28, 2015, the Department published proposed guidance to assist contracting agencies and the contracting community in applying the Order's requirements. On that same day, the Federal Acquisition Regulatory Council (FAR Council) also issued proposed regulations integrating the Order's requirements and the provisions of the Labor Department's guidance into the existing procurement rules.

The Department's proposed guidance would do several things. First, it would define "administrative merits determination," "civil judgment," and "arbitral award or decision," and provide guidance on what information related to these determinations must be reported by covered contractors and subcontractors. Second, it would define "serious," "repeated," "willful," and "pervasive" violations and provide guidance to contracting officers (or contractors with respect to their subcontractors) and Labor Compliance Advisors (LCAs) for assessing reported violations, including mitigating factors to consider. Third, it would provide guidance on the Order's paycheck transparency provisions, including identifying those States whose wage statement laws are substantially similar to the Order's wage statement requirement, such that providing a worker with a wage statement that complies with any of those State laws satisfies the Order's requirement. It would also provide a roadmap to contracting officers, Labor Compliance Advisors, and the contracting community for assessing contractors' history of labor law compliance and considering mitigating factors, most notably efforts to remediate any reported labor law violations.

The Department and representatives of the FAR Council have been very active in seeking out stakeholder feedback with the goal of ensuring that the drafters of the guidance and related FAR rule receive a wide range of views and information so that the EO is implemented in a manner that is clear, fair, and effective. For example, on July 22, 2015, representatives from DOL and the FAR Council attended a public roundtable sponsored by the Small Business Administration's Office of Advocacy to hear feedback from small businesses and gain a better understanding of the types of concerns they can expect to be raised in comments from this community.

During those sessions, the regulated community stressed the importance of effective implementation of the order and the need to streamline the disclosure process and minimize the burden on contractors. In response to what we learned from the regulated community in these sessions and in an effort to ensure that this rule creates a fair, reasonable, and implementable process, the proposed guidance and Notice of Proposed Rulemaking (NPRM) would:

- 1.) Leverage existing Federal acquisition processes and systems with which contractors are familiar. Federal contracting officers already must assess a contractor's record of integrity;

however, the information about a prospective or current contractor's workplace violations is not readily available to contracting officials. The regulations and guidance would propose that contracting officers have access to additional information to make more informed decisions, and provide greater transparency for contractors as to the information that will be considered in making that determination.

2.) Phase in parts of the rule over time. Contractors would not be required to disclose violations related to equivalent State laws immediately (other than violations of OSHA state plans), which is expected to significantly reduce the number of violations they will need to report. Separate guidance and an additional rulemaking will be pursued at a future date to identify equivalent State laws, and such requirements will be subject to notice and comment before they take effect. In the proposed FAR rule, the regulated community is also asked to comment on the phased-in subcontractor reporting requirements.

3.) Provide an alternative proposal, under which subcontractors would directly report violations to DOL, rather than to their contractor. If this alternative is adopted in the final rule, the contractor could then rely on DOL's review of the subcontractor's violations in determining whether the subcontractor is responsible. Moreover, the proposed FAR rule has invited public comment on additional or alternative approaches to subcontractor disclosure and reviews of the disclosures.

We are working through the comments to produce a quality guidance document that will better inform Federal procurement decisions; provide contracting officers with the necessary information to ensure accurate, efficient, and consistent compliance with labor laws; help contractors meet their legal responsibilities; and remove truly bad actors from Federal contract consideration—creating a more level playing field for law-abiding contractors. Most importantly, it will also ensure that hardworking Americans get the fair pay and safe workplaces they deserve.

I appreciate the invitation to testify and will be happy to take any questions you may have.



Joe Trauger
Vice President
Human Resources Policy

August 26, 2015

Hada Flowers
General Services Administration
Regulatory Secretariat (MVCB)
1800 F Street NW, 2nd Floor
Washington, DC 20405

Tiffany Jones
U.S. Department of Labor
Room S-2312
200 Constitution Ave., NW
Washington, DC 20210

Submitted via Federal Rulemaking Portal: <http://www.regulations.gov>

**Re: Proposed Federal Acquisition Regulation: Fair Pay and Safe Workplaces,
(FAR Case 2014-025; RIN 9000-AM81); and Department of Labor
“Guidance for Executive Order 13673: Fair Pay and Safe Workplaces”
(ZRIN 1290-AZ02) Comments from the National Association of
Manufacturers**

Dear Ms. Flowers and Ms. Jones:

The National Association of Manufacturers (“NAM”) welcomes this opportunity to submit written comments in response to the Federal Acquisition Regulatory (“FAR”) Council’s Proposed Rule (“Proposed Rule”) and the Department of Labor (“DOL”) Proposed Guidance (“Guidance”) issued on May 28, 2015.¹ The Proposed Rule and Guidance implement the “Fair Pay and Safe Workplaces” Executive Order (“EO 13673”) issued by President Barack Obama on July 31, 2014.

The National Association of Manufacturers (“NAM”) is the nation’s largest industrial trade association and represents manufacturers in every industrial sector and in all 50 states. The NAM is the voice of manufacturing in the United States and informs policymakers about manufacturing’s vital role in the U.S. economy. Many of the NAM’s members are also federal government contractors and subcontractors (together “contractors”) who have a direct interest in Executive Order 13673 and its implementing regulations.

¹ Fair Pay and Safe Workplaces Proposed Rule, 80 Fed. Reg. 30,548 (May 28, 2015); Guidance for Executive Order 13673, Fair Pay and Safe Workplaces, 80 Fed. Reg. 30,574 (May 28, 2015).

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The NAM fully supports and fosters compliance by its members with federal and state labor laws. However, as explained in detail below, EO 13673, the Proposed Rule, and the Guidance, if adopted, would create an unlawful, unfair, and unworkable framework for assessing contractor compliance with federal and state labor laws and would not enhance the efficiency or efficacy of the nation's federal procurement processes. The Proposed Rule and Guidance are substantively flawed because it will not be feasible for contractors and the acquisition workforce community to comply with the requirements of the Proposed Rule and are procedurally defective because the FAR Council's regulatory analysis is insufficient. For the reasons set forth below, the NAM urges the FAR Council and DOL to rescind the Proposed Rule and Guidance.

I. The Proposed Rule and Guidance Encroach On Congressional Authority and Are Contrary To Law

The Proposed Rule and associated Guidance seek to amend federal labor law and, as a result, encroach upon the specific delegations of authority that Congress has made over the last century. Specifically, the Proposed Rule, if adopted, would effectively and improperly amend the federal laws identified in the EO 13673 by altering the enforcement procedures set forth in those laws and by imposing new remedies for violations that are both beyond and contrary to congressional intent. The Proposed Rule is also in direct conflict with the Federal Arbitration Act.

A. The Proposed Rule and DOL Guidance Interfere with the Authority Vested in Specific Agencies by Congress

EO 13673, the Proposed Rule, and the Guidance cite the Federal Property and Administrative Services Act² ("Procurement Act") as the legal basis for the new labor law compliance framework. While that statute authorizes the FAR Council to implement regulations with respect to various procurement statutes, it does not provide the FAR Council with authority to interpret and enforce the labor law statutes identified in EO 13673. Rather, Congress assigned the authority to interpret and enforce the federal labor laws at issue to specific agencies, namely the National Labor Relations Board ("NLRB"), the Equal Employment Opportunity Commission ("EEOC"), the Occupational Safety & Health Commission ("OSHA"), the Wage and Hour Division ("WHD") and other offices within the DOL. For example, NLRB is the only government body vested with the "responsibility and broad discretion to devise remedies that effectuate the policies of the [NLRA]," subject only to limited judicial review.³ If enforced, the Proposed Rule would give contracting officers ("COs") the authority to interpret and enforce the National Labor Relations Act ("NLRA") and the other statutes, effectively usurping authority

² 40 U.S.C. § 121.

³ *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984).

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Congress delegated to other agencies. Courts have consistently held that such encroachment of authority is impermissible.⁴

B. The FAR Council and DOL Propose to Amend Substantive Labor and Employment Laws Improperly Through Administrative Fiat

Through the Proposed Rule and associated Guidance, the FAR Council and DOL seek to effectively amend federal labor and employment law by creating a new enforcement scheme and new punitive sanctions that are inconsistent with congressional intent.

After assessing an employer's violations and alleged violations of federal labor laws, as well as the as-yet-undefined state law equivalents,⁵ to determine whether the employer has a "satisfactory record of integrity and business ethics,"⁶ the CO, in consultation with newly-created Agency Labor Compliance Advisors ("ALCAs"), has authority to recommend suspension and debarment, disqualifying the employer from being awarded or retaining government contracts worth potentially tens of millions of dollars.⁷ As such, EO 13673 creates a new enforcement scheme, with punitive remedies, that is unnecessary and contrary to existing federal law.

Extensive, unique, and robust enforcement schemes already exist for each of the impacted federal laws identified in EO 13673. After careful deliberation, Congress determined that certain of the statutes, such as Title VII of the Civil Rights Act ("Title VII"), the American with Disabilities Act ("ADA"), the Family Medical Leave Act ("FMLA"), and the Fair Labor Standards Act ("FLSA") should be enforced by both federal agencies and private causes of action, while others, such as the NLRA and the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA"), should be enforced exclusively by federal administrative agencies. History shows that the existing enforcement procedures have been effective. In fiscal year 2014, for

⁴ *Herman B. Taylor Constr. Co. v. Barram*, 203 F.3d 809, 811 (Fed. Cir. 2000) (holding that a contracting officer of General Services Administration "has no jurisdiction itself to determine a labor provisions dispute or to review the Labor Department's ruling on that issue"); *Cape May Greene Inc. v. Warren*, 698 F.2d 179, 190 (3d. Cir. 1983) (recognizing that agency action may be questioned when it is "not clearly mandated by the agency's statute [and] begins to encroach on congressional policies elsewhere"); see also *True Oil v. Commissioner*, 170 F.3d 1294, 1304 (10th Cir. 1999) ("FERC has no Congressional authority to interpret any provision of the Internal Revenue Code").

⁵ The DOL announced in its Guidance that it will define "equivalent state laws" as part of a future rulemaking. Without this critical definition, the Proposed Rule and Guidance are incomplete and prevent companies from fully understanding the scope of the new requirements. Until the DOL has identified the "equivalent state laws" that will be covered under the requirements of EO 13673, the FAR Council and DOL should postpone the issuance of the final rule and guidance.

⁶ E.O. § 2(a)(iii).

⁷ E.O. § 2(a)(vi).

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example, the EEOC, which is charged with enforcing Title VII, the ADA, the Age Discrimination in Employment Act (“ADEA”), and the FMLA, received 88,442 private sector charges and resolved more than 98 percent of them.⁸ By inserting a new remedial scheme, centered upon Contracting Officers and ALCAs who have previously had no role in enforcing these statutes, the Proposed Rule and Guidance will disrupt a well-functioning enforcement regime.

Nothing in the proposed regulations suggests that the existing enforcement procedures followed by the EEOC, NLRB, OSHA, the Office of Federal Contract Compliance Programs (“OFCCP”), or other offices within the DOL are any less effective with regard to federal contractors or subcontracts than they are with other employers who are not federal contractors or subcontractors. Nor does anything in the Proposed Rule or Guidance justify the need for the newly created “labor compliance agreements” that contractors will be expected to execute to demonstrate efforts to mitigate the alleged violations under the scheme set forth in the Proposed Rule and Guidance.

In addition to robust enforcement procedures, Congress also created unique remedial schemes for each of the relevant federal statutes, consistent with each statute’s history and purpose. For example, several of the statutes identified in EO 13673, including the NLRA, are intended to be purely remedial in nature, not punitive. Accordingly, the NLRB provides “make-whole” relief, which is intended to restore the status quo prior to the violation. Congress gave the NLRB no authority to issue punitive economic sanctions. By contrast, Congress established a remedial scheme for violations of Title VII, ADA, and FMLA, pursuant to which the EEOC and private plaintiffs can seek punitive damages in addition to make-whole relief. With a vast array of remedies at its disposal and decades of experience, Congress decided long ago that sanctions under the federal contracting process were *not* appropriate remedies for violations of the NLRA, OSHA, Title VII, ADA and many of the other laws identified in EO 13673. Congress determined that the suspension and debarment remedy should be available for violations of only two of the statutes identified in EO 13673: the Davis-Bacon Act and the Service Contract Act. If Congress had intended for federal contracting remedies, such as debarment, to apply to violations of the other laws cited in EO 13673, it would have provided them.⁹

Moreover, history shows that the specific remedies provided by each of the relevant labor laws were adopted by Congress as a matter of conscious choice. All of the federal statutes within the scope of EO 13673 and Proposed Rule have existed for decades, affording Congress the opportunity to assess, reassess, and amend the statutes’ remedial provisions if it believed such

⁸ EEOC Issues FY 2014 Performance Report, *available at* <http://www.eeoc.gov/eeoc/newsroom/release/11-18-14.cfm>

⁹ *Meghrig v. KFC W, Inc.*, 516 U.S. 479, 485 (1996) (“Congress . . . demonstrated in CERCLA that it knew how to provide for recovery of cleanup costs, and . . . the language used to define the remedies under RCRA does not provide that remedy”).

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action was warranted. And Congress has, in fact, taken the opportunity to amend the remedial provisions of several of the statutes identified in EO 13673, the Proposed Rule, and the Guidance. For instance, Congress amended Title VII and the ADA in 1991 to allow for the recovery of compensatory and punitive damages. But in so doing, Congress placed specific caps on the amount of damages that could be awarded, limiting the potential liability of even the largest employers to \$300,000 in combined compensatory and punitive damages.¹⁰ Applying the debarment remedy, a punitive sanction that could amount to tens of millions of dollars or more, to violations of Title VII or the ADA would clearly be contrary to congressional intent.

In fact, one need look no further back than four months ago for an example of Congress re-assessing the remedial schemes available under federal labor laws. In April 2015, the House of Representatives revisited the issue of whether debarment should be a remedy available under the FLSA, and decided against such a remedy. That is only the most recent example of Congress considering, and deciding against, modifying the remedial scheme established by the federal labor laws at issue here.¹¹

In short, EO 13673 and the Proposed Rule are contrary to law because they effectively amend existing federal statutes by erecting new enforcement procedures and imposing new and punitive sanctions that Congress never envisioned or intended.¹²

C. The Proposed Regulations Conflict with the Federal Arbitration Act

Congress enacted the Federal Arbitration Act (“FAA”) in 1925 to establish a strong federal policy in favor of arbitration.¹³ The Supreme Court has recently reconfirmed the vitality

¹⁰ 42 U.S.C. § 1981a (a)(1) & (d)(1)(B).

¹¹ On April 30, 2015, the House rejected an amendment offered by Representative Mark Pocan (D-Wis) to the FY 2016 Military Construction and Veterans Affairs Appropriations Bill (H.R. 2029) that would have automatically debarred any contractor that reported an FLSA violation over the past five years.

¹² See, e.g., *Wisconsin Dept of Indus. Labor & Human Relations v. Gould Inc.*, 475 U.S. 282, 286 (1986) (executive has no authority to prescribe his “own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the [NLRA]”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (“When the President “takes measures incompatible with express or implied will of Congress, his power is at its lowest ebb.”).

¹³ See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (the FAA is “a congressional declaration of a liberal policy favoring arbitration agreements . . . as a matter of federal law, any doubts conceding the scope of arbitrable issues should be resolved in favor of arbitration”); *Arciniaga v. GMC*, 460 F.3d 231, 234 (2d Cir. 2006) (“it is difficult to overstate the strong federal policy in favor of arbitration” embodied in the FAA).

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of the FAA in *AT&T Mobility LLC v. Concepcion*, confirming that states cannot pass laws inconsistent with the FAA's mandate to broadly enforce agreements to arbitrate.¹⁴

Consistent with the strong federal policy favoring arbitration, courts have consistently held that employers have the right under the FAA to require employees to agree to pre-dispute arbitration agreements covering Title VII claims.¹⁵ The Proposed Rule prohibits companies with federal contracts or subcontracts of \$1 million or more from requiring employees to sign arbitration agreements for disputes alleging violations of Title VII (including sex, race, national origin, and religious discrimination claims) or "any tort related to or arising out of sexual assault or harassment."¹⁶ By limiting rights granted by the FAA, the Proposed Rule conflicts with federal law and cannot be enforced.

The pre-dispute arbitration ban found in Section 6 of EO 13673 is clearly modeled after the "Franken Amendment," which prohibits Department of Defense contractors from using pre-dispute arbitration agreements in certain circumstances. However, the Franken Amendment, unlike EO 13673, is valid because Congress approved the provision as part of the Department of Defense Appropriations Act of 2010. Here, the Administration is effectively attempting to amend the FAA through executive order. Such action, which will likely be codified through the Proposed Rule, should be accomplished only through Congressional legislation.

D. The Proposed Rule Exceeds the Statutory Authority Provided by the Procurement Act

The Proposed Rule exceeds the President's authority under the Procurement Act,¹⁷ the cited statutory authority for EO 13673 and the Proposed Rule. The Procurement Act provides the President authority to prescribe policies and directives necessary to carry out the goals of providing the government with an "economical and efficient" public procurement system.¹⁸ However, a President cannot simply issue an executive order under the guise of making procurement more efficient. Instead, there must be a "manifestly close nexus between the Procurement Act's criteria of efficiency and economy" on the one hand, and the requirements imposed by the Proposed Rule on the other.¹⁹ Here, there is no such nexus. Rather, the requirements of the Proposed Rule will almost certainly make the procurement system more

¹⁴ 563 U.S. 321 (2011).

¹⁵ *Ashbey v. Archstone Prop. Mgmt., Inc.*, 2015 U.S. App. LEXIS 7819 (9th Cir. May 12, 2015); see generally *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (confirming that employment contracts are subject to the FAA unless an employee falls within one of the specifically enumerated exceptions stated in the Act).

¹⁶ See, e.g., *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 204-06 (2d Cir. 1999); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 365 (7th Cir. 1999).

¹⁷ 40 U.S.C. § 121.

¹⁸ *Id.*

¹⁹ *Liberty Mutual Ins. Co. v. Friedman*, 639 F.2d 164, 170 (4th Cir. 1981).

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expensive and less efficient. Thus, the requirements imposed by EO 13673 and the Proposed Rule are not authorized by the Procurement Act and are not valid.

When one examines the claim that the proposed new regime will render procurement more efficient, one can readily see that claim is without basis in fact, and the intent behind EO 13673 and the Proposed Rule becomes clear: the Administration is seeking to set national labor policy, in a clear “end run” around Congress. For instance, Section 1 of EO 13673 states that “[c]ontractors that consistently adhere to labor laws are more likely to have workplace practices that enhance productivity and increase the likelihood of timely, predictable, and satisfactory delivery of goods and services to the Federal Government.”²⁰ While this articulated policy rationale is based on several recent reports that examine labor violations by federal contractors, it is clear that the FAR Council’s reliance on these reports is misplaced. The proposed rule cites a study conducted by the Center for American Progress (“CAP”)²¹ for the proposition that there is a “strong relationship between contractors with a history of labor law violations and those with performance problems.”²² Yet, when the author of the report testified before Congress in February, she conceded that there was no provable linkage between performance and labor violations.²³ At best, the CAP report is a case study, rather than an empirical analysis of the correlation between the labor compliance record of a federal contractor and contract performance, as the CAP study only analyzed 28 companies (equal to .001 percent of the companies that will be affected by the Proposed Rule). In other words, the Administration’s attempts to link this labor-related policy with the Procurement Act’s goals of economy and efficiency are based on unfounded speculation. In all likelihood, the Proposed Rule will have the opposite effect of what is intended – it will increase costs and bog down the procurement process.

II. The Proposed Rule and Guidance are Unworkable

The NAM has significant concerns with the practical application and far-reaching scope of the Proposed Rule and Guidance, which will necessitate a costly reporting regime for contractors regardless of their record of labor law compliance. Indeed, the NAM is concerned that the Administration fails to appreciate the impact of the Proposed Rule and Guidance, both

²⁰ EO 13673, Fair Pay and Safe Workplaces 79 Fed. Reg. 45,309 (Aug. 5, 2014).

²¹ Karla Walther and David Madland, At Our Expense: Federal Contractors that Harm Workers Also Shortchange Taxpayers (December 2013).

²² Fair Pay and Safe Workplaces Proposed Rule, 80 Fed. Reg. 30,548, 30,549 (May 28, 2015).

²³ “The report finds that one in four contractors with these problems []—also have performance problems. We cannot establish a causal relationship; that would be very difficult.” Transcript from The Blacklisting Executive Order: Rewriting Federal Labor Policies Through Executive Fiat from Feb 26, 2015 before the Subcommittee On Workforce Protections Jointly With The Subcommittee On Health, Employment, Labor, And Pensions.

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from a cost perspective and from the impact of the Proposed Rule and Guidance on the contracting process.

The Administration has stated that “the vast majority of federal contractors play by the rules”²⁴ and that contracting officers will only take into account “the most egregious violations.”²⁵ However, the Administration’s claim that the requirements of Fair Pay and Safe Workplaces will be a “check the box”²⁶ exercise for the majority of contractors – *i.e.*, that most contractors will be able to report no labor law violations – is contradicted by the DOL’s broad definition of reportable labor violations. As noted in Section 3, the Proposed Rule would require contractors and subcontractors to report non-final initial assessments which are a far cry from determinations of guilt. The broad definitions in the Proposed Rule and Guidance will cast a wide net for contractors who will be required to check “yes” when asked to certify whether they have had any labor violations in the past three years. In fact, there is no question that even the Federal Government itself would need to check “yes” under the framework outlined in the Proposed Rule.²⁷ Moreover, regardless of which box a contractor checks, the contractor will be required to comply with the onerous data collection requirements, described below, for itself and its subcontractors.

The relatively low threshold for compliance (\$500,000) means that the requirements of “Fair Pay and Safe Workplaces” will affect a significant portion of the contracting community. For most contractors, just the initial step of determining whether their company has any violations to disclose will be a significant undertaking. This is especially true at large companies that will need to collect information about citations, complaints, and arbitral awards across various geographic locations and business units within the bidding entity. But it is equally true of small businesses, many of whom have prime contracts of \$500,000 or more, and would face the prospect of diverting critical resources to focus on complying with the new burdens imposed by the Proposed Rule. These small businesses would be tasked with collecting and reporting labor compliance information not only for themselves, but for their subcontractors, including in many cases large businesses performing as subcontractors. The heavy data collection burden is compounded by the fact that the process needs to be repeated every six months after award. Such compliance burdens will undoubtedly add delay to the acquisition of manufactured goods, ranging from weapons systems to life-saving medical equipment.

²⁴ Fact Sheet: Fair Pay and Safe Workplaces Executive Order Jul 31, 2014, <http://www.dol.gov/asp/fairpay/FPSWFactSheet.pdf> (last visited July 2, 2015).

²⁵ *Id.*

²⁶ Secretary of Labor Tom Perez, “Reviewing the President’s Fiscal Year 2016 Budget Proposal for the Department of Labor,” Mar 18, 2015.

²⁷ *Martin et al. v. United States of America*, 1:13-cv-00834 (Fed. Cl. Jul. 31, 2014) (“It is the view of the court that the government’s payment to employees two weeks later than the scheduled paydays for work performed during the October 2013 budget impasse constituted an FLSA violation.”)

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A. The Rule will Force Contractors to Create New Databases and Procedures

At present, most companies do not have systems in place to implement the new information collection and reporting requirements of the Proposed Rule. In fact, the NAM surveyed its members on this issue and found that 68 percent do not currently have systems in place to track the information required under the proposed rule. Further illustrating the burden this rule will impose, 61.7 percent of those surveyed indicated the initial cost of developing a system to monitor the information for reporting would cost between \$25,000 and \$1,000,000 depending on the operations of the manufacturer. In order to comply, contractors will be required to create new databases and collection mechanisms to account for information subject to disclosure.²⁸ Moreover, contractors would be required to develop new internal policies and procedures and hire and train new personnel to ensure compliance with the proposed requirements.

The imposition of this burden is not merely a cost to the business community; it is also a cost that will be shouldered by the American taxpayer. As contractors are forced to expand their compliance departments, much of this expense will get passed on to the government through cost contracts and higher fixed prices. Moreover, many commercial contractors may decide that the cost of doing business with the government has simply become too high and leave the market entirely. In a 2014 survey of our members, 75.6 percent cited rules and regulations as the biggest obstacles to bidding on a federal contract.²⁹ In response to the issuance of EO 13673, 25 percent said they would be less likely to bid on a federal contract if the EO's requirements were implemented.³⁰ Similarly, potential new entrants to the government contracts market may be deterred by the up-front investment that will be required to comply with the Proposed Rule and Guidance. A reduction in the number of companies competing for federal contracts will reduce competition and raise prices. The Procurement Act gives the President authority to implement changes that will increase economy in the procurement system, but the clear impact of the Proposed Rule will be *increased* costs to the public whenever the federal government procures goods or services.

²⁸ For contractors performing work on classified contracts, the new databases will need to be securely designed to protect against the unauthorized disclosure of classified information.

²⁹ NAM/Industry Week 3Q 2014 Survey of Manufacturers: Special Questions on Labor Regulations, Health Insurance, Sept. 5, 2014, results available at <http://www.industryweek.com/regulations/namindustryweek-3q-2014-survey-manufacturers-special-questions-labor-regulations-health-> (last visited July 31, 2015).

³⁰ *Id.*

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B. Certifying Subcontractor Compliance

In addition to requiring contractors to certify their own labor law compliance on each and every contract exceeding \$500,000, the Proposed Rule envisions that contractors will also certify subcontractor and supplier labor law compliance. Implementing this requirement will be impractical — if not impossible — for the entire contracting community, from large defense companies to the small manufacturers of key components further down the supply chain. The FAR Council and DOL recognized this impracticality, at least implicitly, by requesting input on potential “alternatives” to this requirement.³¹

For even the most sophisticated government contractors, the collection and reporting of *subcontractor* labor compliance data creates an unprecedented data collection and reporting burden. On large federal projects—such as manufacturing a weapons system—a prime contractor might enter into hundreds of subcontracts during the performance of the contract. Consider the contract award to a major defense contractor to provide combat vehicles to the Army.³² Since it first signed the contract in 2011, the contractor has entered into subcontracts with more than 200 companies.

Given that the contractor is performing a \$300M contract to build combat vehicles, it is not surprising that most of the subcontracts will be covered by the Proposed Rule — *i.e.*, they are valued at over \$500,000 and fall outside the exception for commercially available off-the-shelf (“COTS”) items. In fact, some sub-awards are so large (*e.g.*, a \$19M subcontract) that there are almost certainly covered subcontracts at several tiers down the supply chain.

Under the requirements of the Proposed Rule, the contractor would be charged with collecting, reporting, and updating information about its own labor law compliance, *and* collecting, reporting, and updating labor compliance information from all of the subcontractors, and evaluating whether they have a satisfactory record of integrity and business ethics based on the reported three-year labor violations history, prior to awarding them work. Moreover, the contractor would be required to monitor each subcontractor’s responsibility throughout the duration of the contract, reviewing the subcontractors’ labor compliance information every six months. And all of this data collection and diligence would represent just one of the hundreds of contracts that the contractor held in FY 2014 that would be covered by the Proposed Rule. When applied across a company’s portfolio of covered contracts, the reviewing of subcontractors’ labor violations will be a crushing burden. Moreover, the reporting requirements envisioned in the

³¹ For example, the FAR Council is considering using alternative language in paragraph (c) and (d) of FAR 52.222-BB in which subcontractors would be required to disclose details of violations to DOL rather than the prime contractor.

³² This example is based on real contract data obtained from USASpending.gov.

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Proposed Rule would create an avalanche of reports to COs and other government officials charged with evaluating contractor labor compliance.

Satisfying the requirements of the Proposed Rule will be even more difficult for small businesses when asked to make responsibility determinations for their subcontractors. Small businesses, including Service-Disabled Veteran-owned, Women-owned, and HUBzone small businesses, frequently serve as prime contractors while subcontracting with large contractors that are household names. In such situations, the small businesses will be ill-equipped to collect and evaluate information about labor law violations from a multi-national Fortune 500 company in order to decide whether that company has taken sufficient remedial steps to improve labor practices. If forced to put such data collection and reporting mechanisms in place, it is likely that many small businesses will not be able to bid on the work. This impediment to the participation of small businesses is in contravention of the government's long-standing policy of maximizing procurement opportunities for small businesses.

In addition to the practical difficulties of collecting data from subcontractors, there are competitive reasons as to why the proposed prime-sub reporting regime is problematic. It is not uncommon for contractors to team on one project only to be competitors on the next procurement. Forcing subcontractors to disclose confidential and competitively sensitive information to primes – who may be their competitors on the next procurement – will alter the prime/sub relationship because the prime will learn information about violations that it can use against subcontractors in subsequent competitions. In other words, the Proposed Rule could fundamentally alter the prime/subcontractor relationship that the government depends on for the delivery of innovative products and solutions.

C. The Proposed Rule will Introduce Substantial Inefficiency and Unfairness into the Procurement Process

1. Inefficiency

Not only will the requirements of "Fair Pay and Safe Workplaces" be impractical for contractors, but they will also be unworkable for the Federal acquisition workforce to implement. In order to meet the requirements of the Proposed Rule, a CO will be required to take the following steps for every contract award over \$500,000 in which an offeror reports a labor violation:

- First, the CO must check to see if the contractor has disclosed any violations in the System for Award Management ("SAM") as part of the initial certification;
- Second, the CO must request all relevant information about the administrative merits determination, civil judgment, or arbitral award;

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- Third, the CO must furnish the ALCA with all of this information and request that the ALCA provide written advice and recommendations within three business days of the request;
- Fourth, the CO must review the DOL Guidance and the ALCA's recommendation;
- Fifth, the CO must consider the mitigating circumstances such as the extent to which the contractor has remediated the violation or taken steps to prevent its recurrence;³³
- Sixth, the CO must make a responsibility determination as to whether the contractor is a responsible source with a satisfactory record of integrity and business ethics.
- Lastly, the CO will need to take the time to document the various stages of this process in order to develop a more favorable administrative record in preparation for bid protests regarding the responsibility determination.

The administration estimates that the steps above will only take COs two hours per contract.³⁴ In reality, it will take COs far longer to complete these steps even with the help of the ALCA. The Proposed Rule requires that COs ask offerors for all relevant information about the labor law violations at the time that the CO initiates a responsibility determination. In practice, most responsibility determinations are made between the source selection decision and the award of the contract. Accordingly, most contractors will interpret this request for information about the violations as an indication that they are well-positioned to receive the contract. With key awards on the line, most contractors will undoubtedly inundate the CO with information about mitigating factors and remedial measures in light of the fact that EO 13673 requires the CO to consider such information. This point is proven when 45.9 percent of NAM members surveyed indicated it would take more than ten hours to gather the relevant mitigating information to submit to the ALCA and CO. This will be especially true in cases in which a disputed labor violation is still on appeal at the time of the disclosure. In such circumstances, contractors will be best served by submitting in-depth briefing on the matter to the ALCA and CO in order to show that the contractor is likely to prevail on appeal. Giving contractors the option to supply such information is absolutely necessary to ensure some degree of fairness. Of course, by providing this necessary opportunity, the Proposed Rule and Guidance put the onus on the ALCA and the CO to carefully consider the full record submitted by the contractor. This will be no small feat, given the number of contract actions that will be subject to this process and, without a doubt, will result in a less efficient and more cumbersome procurement process in total. If the ALCA and

³³ Fair Pay and Safe Workplaces Proposed Rule, 80 Fed. Reg. 30,548 (May 28, 2015) ("The Executive Order (E.O.) requires that prospective and existing contractors disclose certain labor violations and that contracting officers, in consultation with labor compliance advisors, consider the disclosures, including any mitigating circumstances, as part of their decision to award or extend a contract.")

³⁴ The "Government Costs" section of the RIA analysis only allots two hours for the CO to perform this task.

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CO dedicate too little time to this critical part of the process, the unfairness to the contractor is self-evident.

2. Unfairness

We have a number of concerns about the fundamental unfairness of the Proposed Rule and Guidance. First, our members have found that enforcement of the labor statutes can be uneven. For example, two companies might maintain identical safety practices, but Company A is not subject to an OSHA inspection, whereas Company B is visited by OSHA and receives citations. Under the Proposed Rule and Guidance, the labor record of Company B may render it ineligible for government contracts while Company A will remain eligible, not because Company A's safety practices are any better than Company B's, but simply because the necessarily uneven enforcement scheme has worked in Company A's favor.

Second, due to the enormous demands on a CO's time, and because of the complexity of making responsibility determinations, the requirements of the Proposed Rule will likely result in *de facto* debarment. For instance, CO #1 may find a contractor to be non-responsible based on his or her interpretation of the contractor's labor compliance data. CO #2, in order to reduce his or her increased workload, could understandably decide to follow CO #1's responsibility determination—about the same underlying facts—without conducting the required analysis. If this were to occur, the government would have improperly effectuated a *de facto* debarment of the contractor from federal contracting without due process or the procedural protections embedded in Subpart 9.4 of the FAR. While it is true that contracting with the government is a privilege and not a right, it is equally true that contractors have a due process liberty interest in avoiding the damage to their reputation and business caused by the stigma of broad preclusion from government contracting.³⁵

As the United States Court of Appeals for the District of Columbia Circuit has held, for each contract award, procedural due process requires that the contractor be “notified of the specific charges concerning the contractor's alleged lack of integrity, so as to afford the contractor the opportunity to respond to and attempt to persuade the contracting officer . . . that the allegations are without merit” before being denied a contract award.³⁶ In sum, the requirements of the Proposed Rule could lead to the “blacklisting” of companies – effectively

³⁵ *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 598 (D.C. Cir. 1993).

³⁶ *Old Dominion Dairy Prods. Inc. v. Sec'y of Def.*, 631 F.2d 953, 968 (D.C. Cir. 1980); see also, FAR Subpart 9.4 (prescribing “policies and procedures governing the debarment and suspension of contractors by agencies for the causes given in 9.406-2 and 9.407-2.”).

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preventing them from competing for Federal contracts – based upon the opinion of one contracting officer.³⁷

III. The Proposed Rule Is Unreasonable and Impractical and Will Exclude Responsible Contractors From Doing Business With The Federal Government

A. The Definition of “Administrative Merits Determination” in the Proposed Rule and Guidance is Unreasonable

The Proposed Rule and Guidance define the term “administrative merits determination” to include, among other things,³⁸ unfair labor practice complaints issued by the NLRB, probable cause determinations issued by the EEOC, and OSHA citations. Treating such initial agency decisions as the functional equivalent of proven violations of law is fundamentally unfair for a variety of reasons.

First, requiring employers to report and certify to NLRB unfair labor practice complaints, EEOC probable cause determinations, and OSHA citations as “violations” of law is unreasonable, because such initial assessments are not final, and in many cases not even close to being final determinations of guilt or fault made by a neutral arbiter. The NLRB’s own regulations recognize that unfair labor practice complaints are issued when a “charge *appears* to have merit and efforts to dispose of it by informal adjustment are unsuccessful.”³⁹ Similarly, when the EEOC issues a “Letter of Determination,” it only suggests that there is “reasonable cause to believe” a violation may have occurred, and such determinations are based on a limited record.⁴⁰ An employer’s eligibility to contract with the federal government, with potentially tens of millions of dollars hanging in the balance, should not rest on the mere “appearance” of a violation or an EEOC investigator’s belief based on a review of a limited record that must be completed in a matter of days under the Proposed Rule.⁴¹

³⁷ *Phillips, et. Al, v. Mabus et. al*, Civ. Action No. 11-2021, 2012 WL 476539 (D.D.C.) (“*De facto* debarment occurs when a contractor has, for all practical purposes, been suspended or blacklisted from working with a government agency without due process, namely, adequate notice and a meaningful hearing.”) citing *Trifax Corp. v. Dist. Of Columbia*, 314 F.3d 641, 643-44 (D.C. Cir. 2003).

³⁸ Several of the other agency actions defined to be “administration merits determinations” suffer from the same flaws identified here with regard to unfair labor practice complaints, EEOC cause determinations, and OSHA violations. We have, for simplicity’s sake, not referenced each of those agency actions here.

³⁹ NLRB Rules of Practice & Procedure, 29 C.F.R. §101.8.

⁴⁰ See EEOC Charge Handling Process available at <http://www.eeoc.gov/employers/process.cfm>.

⁴¹ It is also worth noting that an EEOC determination that no probable cause of a violation exists has no preclusive effect on the complaining party; the party filing the discrimination charge may file a lawsuit after receiving the EEOC’s no probable cause determination.

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Second, none of the initial so-called “merits determinations” referenced in the Proposed Rule and Guidance are based on evidence that has been subject to a hearing or cross-examination, much less any kind of judicial review. For example, the EEOC typically investigates charges of discrimination by reviewing information that is provided by the charging party and the employer, interviewing the charging party and in some, but not all, cases, interviewing other relevant witnesses.⁴² Neither the accuser nor the accused employer is afforded the opportunity to confront the other party directly during the investigative process prior to a reasonable cause determination being made, and neither party has the opportunity to subject the evidence of the alleged violations – or the employer’s defenses – to cross-examination. In fact, courts have dismissed EEOC lawsuits because the EEOC conducted only a cursory investigation – or no investigation at all – before finding reasonable cause to believe a violation existed and filing suit.⁴³

Moreover, the ultimate determination of guilt or innocence in most employment cases filed under Title VII, ADA, ADEA and/or NLRA depends on whether the employer acted with discriminatory intent, making witness credibility of paramount importance. The Proposed Rule violates notions of fundamental fairness by treating employers as if they have violated the law before they have had any opportunity to subject their accuser’s evidence to cross-examination before a neutral decision maker. And by requiring certification of initial agency determinations, the Proposed Rule is far more expansive than the “blacklisting” contractor responsibility rule proposed during the Clinton Administration. That rule, which only required employers to report felony “convictions” and “adverse court judgments,” was ultimately withdrawn by the FAR Council as being “unworkable and defective.”⁴⁴

Third, construing the term “administrative merits determination” as anything short of a final order is fundamentally unfair, given the frequency with which agency non-final administrative “merits” determinations are overturned in court. For example, during the forty-year period 1974 through 2014, the federal courts of appeal have overturned or remanded for further consideration in almost 30 percent of all NLRB decisions that were appealed.⁴⁵ The

⁴² See EEOC Charge Handling Process available at <http://www.eeoc.gov/employers/process.cfm>.

⁴³ See, e.g., *EEOC v. Pierce Packing Co.*, 669 F.2d 605 (9th Cir. 1982) (dismissing EEOC lawsuit because the EEOC had conducted no investigation at all before bringing suit); *EEOC v. Sterling Jewelers Inc.*, 3 F. Supp. 3d 57 (W.D.N.Y. 2014) (dismissing nationwide class action because the EEOC failed to conduct a proper investigation of the allegations before filing suit).

⁴⁴ See 65 Fed. Reg. 40830 (June 30, 2000); see also 66 Fed. Reg. 66986, 66987 (Dec. 27, 2001).

⁴⁵ NLRB Appellate Court Decisions, 1974-2014, available at <https://www.nlrb.gov/news-outreach/graphs-data/litigations/appellate-court-decisions-1974-2014>.

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EEOC's recent track record is no better, as courts have repeatedly rejected EEOC positions on significant matters affecting employers nationwide.⁴⁶

Fourth, the relevant agencies, particularly the NLRB and EEOC, have routinely issued complaints that are based on novel, untested theories and that seek to expand or overturn existing law, often reflecting the political leanings of the administration then in place. For example, in recent years, the EEOC has filed several complaints, based on highly questionable theories and evidence, challenging employer use of criminal and credit background checks to screen prospective employees. In *EEOC v. Kaplan Higher Education Corporation*, for instance, the EEOC filed a complaint against an employer that was using the very same credit checks that the EEOC itself was using.⁴⁷ The Sixth Circuit Court of Appeals dismissed the EEOC's action, and in so doing commented:

The EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted by only by the [EEOC's] witness himself.⁴⁸

The Fourth Circuit Court of Appeals recently issued a similar rebuke in dismissing the EEOC's challenge to an employer's criminal background and credit history checks in *Equal Employment Opportunity Commission v. Freeman*.⁴⁹ In *Freeman*, Judge Agee wrote a concurring opinion chastising the EEOC and cautioning the agency:

The EEOC must be constantly vigilant that it does not abuse the power conferred upon it by Congress as its "significant resources, authority, and discretion" will affect all "those outside parties they investigate or sue . . . The Commissions' conduct in this case suggests that its exercise of vigilance has been lacking. It would serve the agency well in the future to reconsider how it might

⁴⁶ See, e.g., *Mach Mining v. EEOC*, __ U.S. __ (2015) (rejecting EEOC position on pre-litigation enforcement procedures); *EEOC v. Honeywell Int'l, Inc.* 2014 U.S. Dist. LEXIS 157945 (D. Minn. Nov. 6, 2014) (denying EEOC request for TRO relating to the Company's wellness program under ADA).

⁴⁷ 748 F.3d 749 (6th Cir. 2014).

⁴⁸ *Id.*

⁴⁹ 2015 U.S. App. LEXIS 2592 (4th Cir. Feb. 20, 2015).

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better discharge the responsibilities delegated to it or face the consequences for failing to do so.⁵⁰

The fundamental unfairness associated with labeling initial agency findings as reportable violations should be readily apparent, as demonstrated in cases such as *Kaplan* and *Freeman*. If the Proposed Rule were already in place, the employers in those cases would have been required to certify as labor law violators, putting them at risk of losing federal government contracts, even though neither employer violated the law.⁵¹ The *Kaplan* and *Freeman* cases are particularly illustrative of the perils of the Proposed Rule because the employers were alleged to have violated the law, in a reportable “administrative merits determination,” for conducting background checks that they believed would help them avoid hiring individuals with a demonstrated lack of “integrity or business ethics.”

Additionally, the Proposed Rule and Guidance are particularly unfair, and could lead to inconsistent results, with respect to NLRB complaints, given the NLRB’s well-known non-acquiescence policy. Pursuant to its non-acquiescence policy, the NLRB will continue to pursue legal positions that have been expressly rejected by a circuit court of appeals or even by several circuit courts of appeals. For instance, in *D.R. Horton, Inc., v. NLRB*,⁵² the Fifth Circuit Court of Appeals overturned a highly controversial decision in which the NLRB prohibited the use of class action waivers and held that employers will be deemed to have violated NLRA if they require employees to sign such waivers. The NLRB confronted the very same issue again, a year later, in *Murphy Oil USA, Inc.*, where the NLRB reaffirmed the position it took in *D.R. Horton*, despite recognizing its decision had been expressly overturned by Fifth Circuit, and also rejected by the Second and Eighth Circuits.⁵³ If the Proposed Rule were in place now, the employer in *D.R. Horton* would not be required to certify as a labor law violator, given the Fifth Circuit’s

⁵⁰ 2015 U.S. App. LEXIS 2592, at *22-23.

⁵¹ The EEOC has filed numerous other frivolous complaints that would constitute reportable “administrative merits determinations” under the Proposed Rule and Guidance. *See, e.g. EEOC v. West Customer Mgmt.*, 2014 U.S. LEXIS 125126 (N.D. Fla. Sept. 8, 2014) (attorneys’ fees awarded against the EEOC, after court concluded that the EEOC’s evidence “was not sufficient to make out a prima facie case” and the EEOC’s continued prosecution of the case “was plainly frivolous for the lack of evidence supporting the claim”); *EEOC v. TriCore Reference Labs*, 2012 U.S. App. LEXIS 17200 (10th Cir. 2012) (an award of attorneys’ fees imposed against EEOC in ADA case because court determined “[t]he EEOC continued to litigate the . . . claims after it became clear there were no grounds upon which to proceed” and the EEOC’s pursuit of the claims were “frivolous, unreasonable, and without foundation”); *see also* U.S. Senate Committee on Health, Education, Labor and Pensions, *EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities, and Lack of Transparency Raise Concerns about Important Anti-Discrimination Agency*, (Nov. 24, 2014) (identifying instances of EEOC litigation abuse) at <http://www.help.senate.gov/imo/media/doc/FINAL%20EEOC%20Report%20with%20Appendix.pdf>.

⁵² 737 F.3d 344 (5th Cir. 2013).

⁵³ 361 NLRB No. 72, slip op. at 2 (Oct. 28, 2014).

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decision, while other employers that use class action waivers would continue to receive NLRB complaints, be required to certify as labor law violators, and be subject to potential debarment.

B. Responsible Contractors May Be Required to Report as Labor Law Violators, and Be Disqualified from Contracting, For Excessive Periods

Requiring employers to certify as labor law violators based on alleged but unproven violations of law is particularly improper because employers must fully exhaust agency administrative processes before obtaining judicial review, which can take years or even decades. Pursuant to the Proposed Rule, an employer could be required to certify as a labor law violator for a period of three years after receiving an agency's initial determination, an interim agency decision, and an agency board decision, all before obtaining a court decision that might vindicate the employer of any wrongdoing. As a result, an accused but innocent employer could be disqualified or otherwise disadvantaged from federal contracting for an extended period based on meritless allegations while it exercises its right to appeal the unjust ruling.

The NLRB case *Erie Brush & Mfg.* is illustrative.⁵⁴ There, the NLRB issued an unfair labor practice complaint in 2006 alleging that the employer unlawfully refused to bargain by declaring impasse in negotiations prematurely.⁵⁵ An NLRB administrative law judge ("ALJ") issued a decision finding a violation in 2007 and the NLRB, in a divided decision, affirmed the ALJ's decision in 2011.⁵⁶ The employer appealed, and the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") reversed the NLRB's decision in 2012, finding that the employer had not violated the law.⁵⁷ Pursuant to the Proposed Rules and Guidance, the employer in *Erie Brush* would have been required to self-report as a labor law violator from 2006 through 2012 – putting its ability to win or retain government contracts at risk for almost six years – even though it committed no violation.

The timeline in *Erie Brush* is not remotely unique. Indeed, history is replete with cases in which the NLRB, EEOC, and OSHA have issued initial findings of wrongdoing against employers, only to have those findings overturned more than a decade later. For instance, in *E.I. DuPont de Nemours & Company v. NLRB*, 682 F.3d 65 (D.C. Cir. 2012), the employer made changes to a benefit plan consistent with its past practice and pursuant to the reservation of rights language set forth in the benefit plan itself. The NLRB issued a complaint in March 2005, claiming the employer violated the NLRA by not first bargaining with the employer's union. An NLRB ALJ issued an opinion in December 2005 finding a violation, which was affirmed by the

⁵⁴ *Erie Brush Mfg.* 357 NLRB No. 46 (Aug. 8, 2011).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Erie Brush & Mfg. Co. v. NLRB*, 700 F.3d 17 (D.C. Cir. 2012).

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NLRB approximately five years later in August 2010. The D.C. Circuit reversed that decision in June 2012, and remanded the case back to the NLRB where it has remained pending for the last three years. As in *Erie Brush*, the employer in *E.I. DuPont de Nemours* would have been required to self-report as a labor law violator, based on a single violation, for a five-year period, March 2005 through December 2008, and August 2010 through June 2012, even though the violation has been overturned.⁵⁸

C. Innocent Employers May Be Coerced Into Unfavorable Settlements

Applying the definition of “administrative merits determination” contained in the Proposed Rule is also ill-conceived because it will likely result in innocent employers being coerced into settlements. Faced with the potential loss of federal contracts potentially totaling tens of millions of dollars, responsible employers that receive unmeritorious allegations or citations may decide to capitulate and enter into “labor compliance agreements” rather than contest the violations, given the new potential remedy – debarment – imposed under the EO. In other words, upon receiving an OSHA citation, EEOC probable cause determination, NLRB complaint or other “administrative merits determination,” even the most principled and innocent employer will likely decide to preserve its eligibility to receive and retain federal contracts, rather than exercise its legal right to appeal such determinations, irrespective of the merits.

To the extent contractors make a considered judgment to not pursue an appeal, simply to stay in the contracting game, this outcome runs the risk of further emboldening regulators to overreach, perhaps with more experimental legal theories, knowing that most contractors will enter into labor compliance agreements rather than risk a non-responsibility determination. Indeed, the Proposed Rule states that the extent to which an employer has remediated a “violation” – which includes entry into a “labor compliance agreement” – “will typically be the most important single factor that can mitigate the existence of a violation.” That fact only increases the likelihood that innocent employers will feel the need to settle allegations of wrongdoing that they might otherwise contest. Under such circumstances, neither the agency’s “administrative merits determination” nor the contractor’s entry into a “labor compliance agreement” will, in reality, bear any relationship to whether the employer is a responsible contractor. In short, while employers that choose to do business with the federal government can

⁵⁸ See also *SDBC Holdings, Inc. v. NLRB*, 711 F.3d 281 (2d Cir. 2013) (innocent employer would have been required to self-report as labor law violator for almost four years under the Proposed Rule based on NLRB unfair labor practice complaint issued May 2009, an ALJ decision issued in June 2009, and an NLRB decision issued in August 2010, when those decisions were ultimately rejected by the Second Circuit Court of Appeals in March 2013).

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and should be required to abide by certain obligations as a “price of doing business” with the government, those employers should not be compelled to sacrifice their legal rights to do so.

Treating initial agency determinations as reportable violations is particularly problematic in the union setting, because doing so may tip the balance of labor relations impermissibly in favor of unions and in violation of federal labor law. It is no secret that unions have engaged in “corporate campaigns” in an attempt to coerce employers to accede to union demands. As part of the corporate campaign strategy, unions often file a barrage of questionable or meritless claims of wrongdoing under several of the statutes identified in EO 13673. Indeed, OSHA complaints and unfair labor practice charges are a stock in trade of many corporate campaigns.⁵⁹ Permitting judicially-untested allegations of wrongdoing to serve as “administrative merits determinations,” carrying the potential to disqualify employers from federal contracting, will simply provide organized labor with an even greater incentive to file meritless allegations as leverage in any labor dispute with a federal contractor or subcontractor.

**D. Contracting Officers and Agency Labor Compliance Advisors
 Cannot Possibly Assess Potential Violations in an Accurate,
 Timely, Consistent, and Fair Manner**

EO 13673 requires COs and ALCAs to assess reported violations of fourteen complex federal labor laws to make a responsibility determination based on an employer’s record of integrity and business ethics.⁶⁰ In making their assessments, the COs and ALCAs must take into account whether the reported violations are “serious, repeated, willful, or pervasive” as defined in the Guidance. Further, the Proposed Rule and Guidance require that each reported violation “be assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractor, and any mitigating factors.” The NAM believes that it will be infeasible for COs and ALCAs to perform the function delegated to them under the Proposed Rule in any meaningful, consistent, or even-handed way. Once COs and ALCAs have to consider “equivalent state laws,” the task will surely be impossible given that the 20,000 plus unique contractors subject to the proposed rule operate in all 50 states and are therefore covered by countless—and sometimes conflicting—equivalent state laws. For instance, if the FAR Council and DOL determine that each state has even just ten “equivalent

⁵⁹ See Jarol B. Manheim, Trends in Union Corporate Campaigns (U.S. Chamber of Commerce 2005); U.S. Gov’t Accountability Office, GAO/HEH5-00-144, *Worker Protection: OSHA Inspections at Establishments Experiencing Labor Unrest*, at 5 (Aug. 2000) (noting that employers experiencing labor unrest are 6.5 times more likely to be inspected by OSHA than those not experiencing labor unrest); Howard Mavity, *Multiple Embarrassing OSHA Citations: The Next Union Organizing Tactic?* (June 1, 2010).

⁶⁰ E.O. § 2(a)(i)(O).

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state laws,” the ALCAs and COs will be required to consider as many as 200 additional statutory requirements in making responsibility determinations.

**1. The EO and Proposed Rule Cover an
 Extraordinarily Broad Array of Laws that COs
 and ALCAs Cannot be Expected to Master**

As an initial matter, each of the fourteen federal laws identified in EO 13673 is extremely complex and highly nuanced. Taken together, the agencies that administer those fourteen federal laws have issued thousands of pages of substantive administrative regulations pertaining to those laws. The fact that COs and ALCAs must also consider yet-to-be-identified “equivalent state laws” further expands the universe of relevant statutes with which the COs and ALCAs must become familiar. And the relevant statutes are subject to an ever-changing body of judicial interpretation, consisting of thousands upon thousands of decisions. It is wholly unreasonable to assume that any CO or ALCA will have a sufficient understanding of the universe of relevant laws to be able to make the required assessments and to make them consistently. Indeed, it is fair to say that most experienced, full-time labor and employment practitioners cannot claim to have expertise with respect to each of the fourteen identified federal labor and employment laws, much less all of their state law equivalents, regardless of how the state law equivalents are ultimately defined.

The task delegated to COs and ALCAs under EO 13673 and the Proposed Rule is made even more difficult because employers that are required to report violations will likely feel compelled to submit voluminous evidence showing the absence of a violation, their good faith, past remedial measures, and damages-related evidence. Such submissions would almost certainly include all or large portions of a factual record developed in any given matter, including statements of position, affidavits, deposition transcripts, hearing testimony, trial exhibits, and/or legal memoranda. Requiring COs and ALCAs to sift through such materials to assess reported violations and make determinations would be daunting for even the most seasoned labor and employment lawyer. The COs’ and ALCAs’ responsibility would be even more difficult (and unreliable) in cases where the violations reported are based on initial agency determinations and lack any judicial analysis of the relevant evidence. This monumental task, never before required of COs, simply cannot be undertaken in a consistent, meaningful, or fair way.

**2. The Definitions of “Serious, Repeated, Willful
 and Pervasive” Will Not Assist the COs and
 ALCAs in Making Reasonable and Accurate
 Determinations**

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Although DOL has ostensibly identified criteria to assist COs and ALCAs in determining whether reported “violations” of the labor laws are “serious, repeated, willful or pervasive,” the Guidance provided is ill-conceived on many levels.

First, the Guidance states that a violation may be considered “serious” if it affects 25 percent of an employer’s workers. That standard is unworkable. The NLRB has issued complaints in recent years challenging as unlawful employer policies regarding employee use of social media and, as noted above, the EEOC has filed lawsuits based on employer background check polices.⁶¹ Social media policies arguably affect each and every employee in the workplace, and background policies typically apply to most or all applicants for employment. According to the Guidance, NLRB complaints or EEOC reasonable cause determinations challenging employer policies of broad application – often testing the outer boundaries of existing law and/or providing a vehicle through which existing laws are applied to new circumstances in the workplace – would be considered “serious.”

Second, the Guidance also states that violations may be considered “serious” if fines or penalties of at least \$5,000 or back wages of \$10,000 are “assessed.” The Proposed Rule is ambiguous because it does not define the term “assessed.” While the NLRB often seeks economic remedies in the form of back pay, front pay, and interest, those remedies are rarely, if ever, quantified or “assessed” in the NLRB’s complaint or at any time prior to the entry of a final order. Similarly, EEOC probable cause determinations typically do not assess damages in any specific dollar amount. At various points, the Guidance indicates that the threshold dollar amounts will be reached if a violation has “resulted” in a fine of \$5,000 or \$10,000 in back wages, suggesting that an actual judgment must have been entered, but the Guidance is unclear on this point. Regardless of whether the term “assessed” is construed to mean “alleged,” “sought,” or actually “awarded,” virtually every case brought under Title VII, the ADA, or the ADEA, and almost every NLRB case seeking back pay, would trigger a finding of a “serious” violation, given the exceedingly low thresholds identified.

Third, the Guidance also states that any reported “violation involving an adverse action or unlawful harassment for exercising any right protected by law is a serious violation.” That sweeping definition will ensnare nearly every NLRB unfair labor practice complaint issued against an employer involving any “adverse action.” Virtually all NLRB complaints issued against an employer include the allegation that the employer has violated Section 8(a)(1) of the Act, which provides that it is unlawful for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the [NLRA].” Since Section 8(a)(1) allegations are included in essentially every complaint issued by the NLRB, it would be

⁶¹ See, e.g., *Durham School Servs., L.P.*, 360 NLRB No. 85 (Apr. 25, 2014); *Bettie Page Clothing*, 361 NLRB No. 79 (Oct. 31, 2014).

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absurd to treat every NLRB violation involving alleged violations of Section 8(a)(1) of the NLRA as being “serious.”

Fourth, the Guidance with regard to “willful” violations is equally unhelpful and is, in fact, counterproductive. For example, the Guidance states that an employer will be considered to have engaged in a “willful” violation if the employer maintains an employee handbook stating that the employer provides unpaid leave to employees with serious health conditions as required by the FMLA, but then is alleged to have failed to provide such FMLA leave. The Proposed Rule, if enforced, would effectively penalize those employers that maintain policies advising employees of their legal rights by increasing the gravity of any associated violation or alleged violation.

Fifth, the Guidance with respect to “pervasive” violations is similarly flawed. As part of determining whether a violation is “pervasive,” the Guidance requires CO’s and ALCAs to assess whether an employer has violated the relevant laws with the explicit or implicit approval of “higher-level management.” The Guidance fails to define what constitutes “higher-level management” and provides no workable Guidance to the COs or ALCAs as to what constitutes implicit approval.

Sixth, the Guidance provided to COs and ALCAs regarding “repeated violations” is incomplete and overly simplistic. EO 13673 requires the CO and ALCA to consider whether an employer required to report a violation has had “one or more additional violations of the same or substantially similar requirement in the past three years.”⁶² In describing a “substantially similar” violation under the NLRA, the Guidance states that two violations of the same provision, *e.g.*, two violations of Section 8(a)(5), requiring union recognition and good faith bargaining, should be treated as similar violations, while violations of different provisions (*e.g.*, Section 8(a)(2) and Section 8(a)(3)), should not be considered substantially similar violations. This analysis fails to appreciate that not all violations of the same statutory provisions are similar in degree of seriousness or culpability.

For instance, there are a variety of potential Section 8(a)(5) violations varying widely in terms of seriousness and impact on employees. One may violate Section 8(a)(5) by changing employees’ terms and conditions of employment unilaterally without bargaining, by failing to respond adequately to union information requests, or by failing to negotiate in good faith with the employees’ union. Not all Section 8(a)(5) violations are of equal gravity, however. Indeed, employers may knowingly commit a technical refusal to bargain in violation of Section 8(a)(5) simply because that is the only way they are able to appeal NLRB rulings in representation cases. NLRB decisions in representation cases are not final, appealable orders, so if a union wins an

⁶² E.O. § 4(b)(1)(B)(2).

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election, to contest an NLRB election ruling, an employer must first refuse to bargain with the union that wins the election, committing an unfair labor practice in violation of Section 8(a)(5). The NLRB then issues a complaint, which allows the employer to raise its objections to the election as a defense to the unfair labor practice complaint. The NLRB will almost always reject the employer's defense, permitting the employer to litigate its election objections in the context of the unfair labor practice case before a circuit court of appeals.⁶³ Unfair labor practice complaints issued in "test of certification" cases should not be treated as a violation of law at all, much less a serious, willful or repeated violation, as they bear no relationship whatsoever to whether an employer is or would be a responsible federal contractor. Simply put, in those cases, employers are required by the law to violate provisions of the NLRA in order to exercise their rights under the Act.

While experienced practitioners may be expected to understand the subtle and not so subtle differences between various types of labor law violations, it is wholly unreasonable to expect COs and ALCAs to appreciate such differences or make proper and consistent determinations as to whether violations are serious, willful, repeated, or pervasive as required by the Proposed Rule.

The fact that CO's and ALCA's will be expected to make such assessments with regard to "equivalent state laws" further exacerbates the problem and virtually guarantees inconsistent determinations. For example, just one government contractor might have operations in a dozen states which could very well subject the contractor to over a hundred equivalent state laws. It will be near impossible for the CO and ALCA to understand the subtle differences and nuanced terminology across states. Many state discrimination laws provide protections that are similar to, but broader than, those set forth in Title VII or sister jurisdictions. The District of Columbia prohibits discrimination based on appearance and political affiliation, two characteristics that are not embodied in Title VII.⁶⁴ Similarly, California law prohibits discrimination based on sexual orientation and gender identity, while New York law prohibits discrimination based on sexual orientation but not gender identity.⁶⁵ Title VII currently prohibits discrimination based on gender identity but not sexual orientation. Accordingly, COs and ALCAs may be confronted with violations of state law based on conduct that would not violate federal law or the laws of several other states. Moreover, California's Occupational Safety and Health State Plan is more stringent than the federal OSHA requirements. For instance, the California plan requires employers to comply with requirements on ergonomics. It is difficult to discern how a violation of one state's law could provide any meaningful measure of whether an employer is responsible if the conduct at issue is perfectly lawful under federal law.

⁶³ See *Aloft Chicago O'Hare*, 355 NLRB No. 117 (Aug. 24, 2010).

⁶⁴ D. C. Human Rights Act, D.C. Code, § 2-1401.11 (a) (2000).

⁶⁵ See Cal. Gov't Code §12940 (West, 2014); N.Y. Exec. Law §296 (McKinnon 2010).

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E. The Paycheck Transparency Provisions of the Proposed Rule Are Burdensome and Unnecessary.

The requirement under the Proposed Rule and Guidance that federal contractors provide all workers with a detailed written pay stub showing hours worked, overtime hours, pay rate and any payroll deductions on weekly basis is unnecessary and burdensome. As an initial matter, many responsible contractors use a bi-weekly payroll system that provides the required information in an easily-understandable form. There is no justification for requiring such contractors to make costly adjustments to their payroll processing systems to provide an overtime breakdown on a weekly basis. Specifically, neither FAR Council nor the DOL cites to any evidence to suggest that employees who currently receive payroll information on a bi-weekly basis are being deceived or deprived of any of their substantive rights.

While EO 13673 states that contractors shall be deemed to have fulfilled the written pay stub requirement if they are complying with “substantially similar” state or local wage payment laws, the DOL has not identified which laws it considers “substantially similar.” While the NAM does not believe that any “Paycheck Transparency” requirements are necessary, no paycheck requirements should be put into effect until the DOL has specifically identified the so-called “substantially equivalent” state and local laws and provided an opportunity for public comment with respect to the laws identified.

Additionally, contractors often use temporary or contingent labor provided through staffing agencies. In such cases, the temporary workers are neither independent contractors nor employees of the contractor. Ordinarily, the contract between the contractor and staffing agency specifies the employment status of the temporary worker, and the staffing agency rather than the contractor is responsible for payroll. The NAM believes it would be duplicative and unduly burdensome to require contractors to provide individual temporary workers of notice of their status and/or to require contractors to provide temporary workers with written pay stubs in addition to those provided by the staffing agency employer.

Finally, the Proposed Rules and Guidance require that contractors provide each worker with notice of their independent contractor status after the effective date of EO 13673 and again before the worker performs work on a covered contract, even if the services the worker provides have not changed. This requirement is burdensome and unnecessary. Simply stated, there is no logical reason why a contractor must repeatedly inform a worker of his or her independent contractor status when there has been no change in either the nature of the parties’ contractual relationship or the nature of the work being performed by the independent contractor.

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IV. The Proposed Rule and Guidance Contain Flawed Regulatory Analyses

In addition to the substantive flaws described above, the Administration's economic analysis and consideration of regulatory alternatives fall woefully short of the obligations imposed by EO 12866, the Paperwork Reduction Act, and the Regulatory Flexibility Act to produce regulatory analyses that are comprehensive, transparent, and thorough. Due to the defects described below, the Proposed Rule should be abandoned or sent back to the FAR Council for further, more rigorous analysis.

A. RIA Based on Erroneous Projections

Accompanying the Proposed Rule is a Regulatory Impact Analysis ("RIA") that is required under EO 12866 (and, by adoption, EO 13563). EO 12866 directs federal agencies to assess the economic effects of their proposed significant regulatory actions, including consideration of reasonable alternatives.

Here, the RIA's assessment of the Proposed Rule's economic effects is deficient because of a flawed methodology for projecting the number of contractors who will be required to check "yes" when asked if they have had any labor violations in the past three years based upon the Proposed Rule and Guidance as currently drafted. In order to estimate the percentage of government contractors with violations subject to disclosure, the RIA extrapolates from the percentage of all businesses (according to 2011 census data) with violations subject to disclosure. Such an approach is inherently misleading because the RIA is considering a universe—all employer firms—that is not representative of the characteristics of the typical government contractor. Namely, government contractors tend to have more employees than the vast majority of employer firms in the census data, and therefore government contractors are more likely to have minor violations that will need to be reported under the Proposed Rule and Guidance.

The impact of this flawed methodology on the FAR Council's projections is apparent by looking at NLRB violations as an example. According to the 2011 Census, there were 5,682,424 employer firms in the country. Of those firms, (62 percent) employed four or fewer employees. Given that employer firms with four or fewer employees are not generally unionized, it is not surprising that only 3,735 employer firms have NLRB violations. Using the large denominator (5,682,424), the RIA calculates that only .07 percent of employer firms nationwide have violations that would trigger disclosure. But it certainly does not follow that only .07 percent of government contractors would have to disclose: (1) a complaint filed by an NLRB regional director, or (2) a finding from the NLRB that a contractor violated the law.⁶⁶ Indeed, a survey of

⁶⁶ Federal Acquisition Regulation (FAR) Case 2014-025, Fair Pay and Safe Workplaces Regulatory Impact Analysis Pursuant to Executive Orders 12866 and 13563, at 9.

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the NLRB's docket from the past three years reveals that NLRB regional directors have filed complaints against 18 of the country's 100 largest contractors (18 percent).⁶⁷ The percentage is far higher among the ten largest contractors—five of which have had complaints filed against them in the past three years (50 percent). And this significant underestimation is just one of the 14 laws covered by EO 13673.

Similarly, the RIA projection falls far short when estimating the number of contractors who will have to disclose OSHA citations. According to the RIA's estimate, only 2.55 percent of contractors will have citations. But OSHA's database reveals that fourteen of the twenty-five largest government contractors have had OSHA citations within the past three years, and 27 of the top 100 have received citations.⁶⁸

The RIA's flawed methodology skews the numbers for the top 100 contractors but also for small businesses that sell to the government. According to the census data, 98.3 percent of employer firms have 99 or fewer employees. In contrast, many government contractors qualify as "small" according to the SBA's industry-based definition if they have 500 or fewer employees. In other words, even "small" government contracts dwarf the size of the employer firms that the FAR Council used to make its calculation. Not surprisingly, small business contractors that are 100 times larger than most employer firms in the census are statistically more likely to have minor labor violations.

The RIA estimates that contracting officers will initiate 40,126 responsibility determinations in a given year. However, the RIA projects that only 1,625 offerors will undergo responsibility determinations after affirmatively disclosing violations—a figure based on the FAR Council's estimate that only 4.05% of contractors will have violations to disclose. By relying on such a wild underestimate, the FAR Council has masked a significant cost of the Proposed Rule.

As described above, over 30% of the top 100 contractors—as measured by obligated contract dollars—will have to report OSHA and NLRB violations under the Proposed Rule. Data about the other labor laws are not publicly accessible, but one can only assume that the RIA underestimates these projections as well. As such, it is likely that 30-50 percent of the country's top contractors would have reportable violations under the Proposed Rule. Assuming that the average government contractor has fewer employees than contractors in the top 100, it makes sense to use the lower bound of the range to extrapolate across all contractors. Thus, if 30% of all contractors have to check the box "yes," then, in any given year, over 12,000 offerors will undergo responsibility determinations after disclosing violations. As such, the actual cost of the

⁶⁷ Data obtained from NLRB's "Cases & Decisions," <https://www.nlr.gov/cases-decisions> (last visited July 2, 2015).

⁶⁸ According to FY 2014 data from the Federal Procurement Data System, https://www.fpds.gov/fpdsng_cms/index.php/en/ (last visited July 2, 2015).

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Proposed Rule to industry and the government will increase exponentially due to: (1) the number of contractors who will feel compelled to assemble materials about remedial measures and mitigating factors as part of the responsibility determination; and (2) the burden on COs who are required by law to consider the mitigating circumstances. In sum, the RIA has dramatically underestimated the number of contractors who will be required to check the box “yes” and who will spend time and money providing information as part of the responsibility determination.

Not only does the FAR Council’s faulty estimate undermine the analysis of the RIA, but it also taints the analysis of the Paper Work Reduction Act and Regulatory Flexibility analysis, discussed below, which rely on the disclosure rate as a defective input in their analysis.

B. RIA Fails to Consider Reasonable Feasible Alternatives

As part of the required analysis under EO 12866, the FAR Council’s RIA is supposed to consider feasible regulatory alternatives. This analysis must include an assessment of the costs and benefits of any reasonable feasible alternatives and an explanation as to why the proposed action is preferable to the potential alternatives. Here, the Proposed Rule fails to adequately consider several reasonable alternatives.

1. Failure to Consider Existing Process for Responsibility Determinations

If there is truly a problem with the procurement system that needs to be fixed (a proposition that the Administration has failed to demonstrate), the FAR Council must first consider making improvements to the existing system. Rather than creating a vast new bureaucracy with ALCAs and labor compliance agreements, and forcing over-worked COs to perform a contract-by-contract analysis, the FAR Council should revisit the mechanisms already in place to help COs make responsibility determinations.

It is worth noting that COs already have the authority to consider labor violation information reported by DOL when making a responsibility determination about a contractor’s record of integrity and business ethics. FAR 9.105 states that when making the responsibility determination, the CO can consider “other sources such as publications; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; Government agencies; and business and trade associations.”⁶⁹ In other words, nothing currently prevents a CO from going to the OSHA website to determine if an offeror has had serious violations in the past three years.

⁶⁹ FAR 9.105-1(c)(5) (emphasis added).

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According to the FAR Council's own estimate, the requirements of the Proposed Rule will cost the government about \$7.6M per year.⁷⁰ As explained above, the likely cost is far higher. Even assuming that the number is accurate, those federal dollars would be far better spent investing in improvements to the existing system rather than adding on a burdensome new layer. For instance, rather than creating the new ALCA positions (at a cost of \$4,692,245 per year), a fraction of these funds could be used to provide robust training to COs on the scope of their authority when making responsibility determinations. Such a reasonable alternative would almost certainly be less burdensome for contractors and far less expensive for the government.

Moreover, FAR 9.4 already gives COs the ability to take action against a contractor who demonstrates a serious lack of business integrity by referring the contractor for a responsibility determination review by an agency's suspension and debarment official. Nonetheless, the FAR Council fails to point out any deficiencies with the suspension and debarment system that makes the Proposed Rule necessary. This failure to consider the existing system as an alternative to the Proposed Rule is even more striking considering the Council's reasoning in 2001 when it rescinded a similar rule—the "blacklisting" rule.⁷¹ As a stated ground for rescinding the rule, the FAR Council concluded:

[T]he current regulations governing suspension and debarment provide adequate protection to address serious waste, fraud, abuse, poor performance, and noncompliance. Any one of these concerns may authorize suspension or debarment under appropriate conditions and circumstances, subject to judicial review.⁷²

The Council's decision to propose a new rule might be justifiable if there was evidence that the suspension and debarment system was no longer a valid tool to protect the government from non-responsible contractors. But in the fourteen years since the blacklisting rule was rescinded, the use of the suspension and debarment system has grown exponentially.⁷³ With the existence of such a robust suspension and debarment system, there is simply no need to create a new layer of bureaucracy.

2. Failure to Consider Measures to Improve Information-Sharing

The Proposed Rule also fails to adequately consider how the objectives of "Fair Pay and Safe Workplaces" could be achieved by improving information-sharing between DOL, COs, and

⁷⁰ Fair Pay and Safe Workplaces Proposed Rule, 80 Fed. Reg. 30,548, 30,558 (May 28, 2015).

⁷¹ Contractor Responsibility—Revocation, 66 Fed. Reg. 66,986 (Dec. 27, 2001).

⁷² *Id.* at 66,988.

⁷³ Interagency Suspension and Debarment Committee's Annual Report to Congress (Mar 31, 2015), <https://isdc.sites.usa.gov/files/2015/04/873report2014.pdf> (last visited July 2, 2015).

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Suspension and Debarment Officials. Under the present system, DOL already reviews federal contractors' compliance with federal labor laws through the Wage and Hour Division, the Occupational Safety and Health Administration, and the Office of Federal Contract Compliance Programs. DOL collects data from these enforcement agencies and makes much of it publicly available through its Online Enforcement Database ("OED"). Rather than requiring contractors to collect and report data that the government already has in its possession, the government could improve its own information-sharing channels so that COs can have the information they need at their finger-tips when making responsibility determinations.⁷⁴

The FAR Council's failure to consider improvements to information-sharing is puzzling in light of the recommendations of the Harkin Report on which the Proposed Rule purportedly relies.⁷⁵ The Proposed Rule cites the report for the proposition that contract awards have been made to contractors with safety and wage-and-hour violations. However, the Proposed Rule ignores 4 of the 7 recommendations contained in that report which address measures to improve information-sharing.

- Recommendation #1: The Department of Labor should take steps to improve the quality and transparency of information on workplace safety violations.
- Recommendation #2: The Department of Labor should annually publish a list of contractors that violate federal labor law.
- Recommendation #3: The Government Services Administration should improve contracting databases by increasing public transparency and expanding the amount of information included in the databases.
- Recommendation #4: The President should issue an Executive Order to allow the Department of Labor to input additional information into FAPIIS concerning contractor compliance with labor law.⁷⁶

Notably, these recommendations do not call for contractors to supply this information. Rather, the recommendations call for the government to become more transparent about the data it has already collected. The recommendations suggest that already-collected information be

⁷⁴ Of course, such a database would not have information about arbitral awards and civil judgments, but first the Administration should see if the information from the enforcement agencies would be sufficient for satisfying the goals of the rule before expanding the scope of the data collection.

⁷⁵ Majority Staff of Senate Committee on Health, Education, Labor and Pensions, *Acting Responsibly? Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk* (2013).

⁷⁶ *Id.* at 30-32.

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included in the Federal Awardee Performance Integrity & Information System (“FAPIIS”) so that a CO could access the data about labor violations when making a responsibility determination.

The Proposed Rule, however, gives short shrift to all of these recommendations. The Proposed Rule acknowledges that in an “ideal scenario,” an agency would have access to a government database with information about a contractor’s labor violations.⁷⁷ However, the Proposed Rule dismisses this as “cost-prohibitive” without any discussion of how much this would cost and how the costs compare to the Proposed Rule. Accordingly, the RIA should analyze how much the government would save if the ALCA position was eliminated and these funds were channeled towards information-sharing improvements so that COs could consider information that the government already has in its possession.

C. Flawed Paperwork Reduction Act Analysis

The primary purpose of the Paperwork Reduction Act (“PRA”)⁷⁸ is to minimize the paperwork and recordkeeping burden that the government imposes on private businesses and citizens. In order to meet the PRA’s requirements, the FAR Council must measure the recordkeeping “burden” in terms of the “time, effort, or financial resources” the public will need to expend in order to comply with the requirements of Fair Pay and Safe Workplaces. This includes:

- reviewing instructions;
- using technology to collect, process, and disclose information;
- adjusting existing practices to comply with requirements;
- searching data sources;
- completing and reviewing the response; and
- transmitting or disclosing information.

Here, the FAR Council’s PRA analysis is deficient because it fails to encompass several of the burdens associated with the Proposed Rule and Guidance. *First*, the PRA analysis estimates that it will only take contractors 6.26 hours to gather the information needed to make the initial certification. This estimate ignores the fact that any contractor who has to make a representation will be required to conduct thorough diligence to mitigate the risk of reporting false information and violating the False Statement Act or False Claims Act.

Second, the PRA fails to calculate the costs to contractors to create data collection systems. The largest federal contractors have operations spread across the country, and there is

⁷⁷ Fair Pay and Safe Workplaces Proposed Rule, 80 Fed. Reg. 30,548, 30,562 (May 28, 2015).
⁷⁸ 44 U.S.C. §§ 3501–3521.

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currently no requirement for contractors to collect and aggregate information on violations of the enumerated labor laws. Accordingly, most contractors will need to create new data collection systems and hire and train employees to ensure that the company is complying with the new requirements across all geographic locations. Putting such systems and procedures in place could cost each larger contractor millions of dollars.

Third, the RIA estimates that the “cost of providing additional information” will only be \$168,350 per year. This estimate is based on a projection that only 1,625 contractors will have to check “yes” and provide additional information once the CO initiates the responsibility determination. As explained above, the 1,625 figure was calculated using the 4.05% disclosure rate based on the projections of the relevant enforcement agencies. Not only will there be more contractors checking “yes,” but these contractors will spend far more time than the 2.8 hours estimated by the RIA. With so many contract dollars on the line, outside counsel will undoubtedly advise their clients to submit lengthy statements contextualizing violations and explaining the remedial measures that have been put in place.

Fourth, if contractors do not have systems in place to collect this aggregated information about their own labor law violations, they most certainly do not collect the same data from their subcontractors. As such, contractors will need to create systems capable of handling large volumes of information from subcontractors who will have the same incentives as prime contractors to contextualize reportable violations. As noted above, a large prime might enter into hundreds of subcontracts, and even if only a small percentage of the subcontractors have reportable violations, the prime will be forced to collect, review, and retain information about the allegations, the proceedings, the judgment, remedial measures, and mitigating factors. Moreover, contractors will need to review and analyze the updated information that is submitted by subcontractors during contract performance to determine if additional action is required. Amazingly, the FAR Council estimates that the total annual cost will be only \$129,548. This is not the cost per contractor but rather the RIA’s estimate of what it will cost all higher-tier contractors that need to review updated information from subcontractors.⁷⁹

Fifth, the RIA underestimates the continuing cost of complying with the Proposed Rule and Guidance by assuming that contractors will only need one employee to review the Proposed Rule and Guidance in the first year. Based on conversations with our members, the NAM believes that the Proposed Rule and Guidance will affect multiple departments within each organization such as human resources, contract management, compliance, legal, and supply chain management. As such, cross-functional teams will need to review and understand the Proposed Rule and Guidance. Moreover, the RIA ignores the fact that contractors will need to continually review the requirements and train their employees to ensure compliance in subsequent years after the Proposed Rule and Guidance are implemented. The RIA allocates no

⁷⁹ Fair Pay and Safe Workplaces Proposed Rule, 80 Fed. Reg. 30,548, 30,563 (May 28, 2015).

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costs for future year training and maintenance of systems that responsible contractors will expend to ensure continuing compliance. Clearly, the projection woefully underestimates the true cost of operationalizing the Proposed Rule.

D. Flawed Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (“RFA”)⁸⁰ requires that federal agencies analyze the impact of their regulatory actions on small entities, and if there is going to be a significant impact on a “substantial number” of these small entities, the agency must seek less burdensome alternatives. As a procedural matter, the RFA sets out precise specific steps an agency must take when conducting an Initial Regulatory Flexibility Analysis (“IRFA”). Namely, an agency must address the following considerations:

- a description of the reasons why action by the agency is being considered;
- a succinct statement of the objectives of, and legal basis for, the Proposed Rule;
- a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- a description of the projected reporting, recordkeeping and other compliance requirements of the Proposed Rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;
- an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and
- a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.⁸¹

As detailed below, the FAR Council’s IRFA failed to adequately consider several of the elements identified by the RFA. As a result, the Council ignored the impact that the Fair Pay and Safe Workplaces requirements will have on businesses across the country.

1. The FAR Council Failed to Articulate Any Rational Reason for “Why Action by the Agency

⁸⁰ 5 U.S.C. § 605(b).

⁸¹ 5 U.S.C. §§ 603(b)(1)-(5), 603(c).

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**Is Being Considered” and Ignored Less Costly
 “Significant Alternatives”**

The FAR Council fails to articulate any rational basis in the IRFA for its decision to promulgate the Proposed Rule. Instead, the FAR Council regurgitates the substance of EO 13673 and summarily claims that the proposed changes will reinforce protections for workers and ensure that the Government contracts with companies with a satisfactory record of business ethics. Nothing in the IRFA provides a basis to support this claim.

Relatedly, the Council ignored its obligations under the RFA to identify less costly alternatives. As explained above, there are significant alternatives to the Proposed Rule which accomplish the stated objectives of Fair Pay and Safe Workplaces while minimizing any significant economic impact on small entities.⁸² The Council’s failure to seriously consider available alternatives is almost certainly attributable to the fact that there is simply no need for the Proposed Rule in the first place. Had the FAR Council considered less costly alternatives, the Council would have concluded that federal dollars would have been better spent improving existing processes rather than requiring data collection and self-reporting which will only increase costs for small businesses.

**2. The FAR Council Failed to Address Whether the
 Proposed Regulations “Overlap or Conflict”
 with Other Federal Laws**

In its IRFA, the FAR Council fails to address whether the Proposed Rule overlaps or conflicts with other federal laws. Indeed, the Council ignores the fact that the Proposed Rule directly overlaps with the FAR’s existing suspension and debarment procedures. For example, the Proposed Rule identifies causes for a non-responsibility determination that overlap with the existing causes for debarment.⁸³ Moreover, each of fourteen labor laws already includes its own complex enforcement mechanisms and remedial schemes—and only some of those allow for the denial of federal contracts as a result of a violation. In fact, in some areas, Congress has explicitly rejected the denial of federal contracts as a remedy, and none of these areas of overlap are identified or addressed in the IRFA.

**3. The FAR Council Failed to Consider the
 “Compliance Requirements” on Small Entities**

Rather than analyzing the compliance requirements of the Proposed Rule, the Council’s IRFA simply repeats the certification requirements of EO 13673 without analysis of the

⁸² 5 U.S.C. § 603(c).

⁸³ Despite the similarity, the proposed rule lacks the procedural protections embodied in the existing suspension and debarment procedures.

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recordkeeping or ongoing compliance requirements that will be imposed on small businesses. In particular, the FAR Council failed to consider the fact that most small businesses are not equipped to monitor the labor violations of their subcontractors, especially when their subcontractors are large corporations. In fact, most small businesses do not maintain systems that would allow them to examine their own labor violations over a period of three-years' time, let alone the violations of a multi-national corporation they may or may not do business with in the future. Unfortunately, the FAR Council apparently made little effort to consider the impact of these compliance requirements on small businesses.

E. Costs of Proposed Rule Clearly Exceed the Benefits

Not only does the FAR Council fail to meet the requirements of EO 12866 and the PRA, which are implemented by the Office of Information Regulatory Affairs, the FAR Council also falls short of its own standards for promulgating rules. FAR 1.102-2(b) directs that amendments to the FAR should be promulgated only when "the benefits clearly outweigh the costs of development, implementation, administration and enforcement." Here, the FAR Council is attempting to do the opposite. The average costs imposed on all contractors—at least \$106,571,022 by the government's own analysis, which, as we have demonstrated, is grossly inaccurate—are disproportionate to any benefit the Administration may obtain by targeting a small number of firms.

The Administration concedes that the Proposed Rule is aimed at "the most egregious violations"⁸⁴ caused by a few bad actors:

Although most federal contractors comply with applicable laws and provide quality goods and services to the government and taxpayers, a small number of federal contractors have been responsible for a significant number of labor law violations in the last decade.⁸⁵

If the problem the FAR Council is trying to solve stems from the actions of a small percentage of contractors,⁸⁶ then the Administration fails to demonstrate why the burdensome system envisioned by the rule should be applied to 24,000 contractors—the "vast majority" of

⁸⁴ Fact Sheet: Fair Pay and Safe Workplaces Executive Order Jul 31, 2014, <http://www.dol.gov/asp/fairpay/FPSWFactSheet.pdf> (last visited July 2, 2015).

⁸⁵ Guidance for Executive Order 13673 "Fair Pay and Safe Workplaces," 80 Fed. Reg. 30574, 30574-75 (May 28, 2015). (emphasis added).

⁸⁶ The Harkin report states that there are 49 contractors with significant labor violations. In other words, of the 24,000 contractors who would be impacted by this regulation only 0.002% have significant violations. This hardly suggests that the procurement system is replete with labor law violators. See, Majority Staff of Senate Committee on Health, Education, Labor and Pensions, Acting Responsibly? *Federal Contractors Frequently Put Workers' Lives and Livelihoods at Risk* (2013).

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which “play by the rules.” Without question, the goal of increasing workplace safety is worthwhile, but the FAR Council fails to show how the benefits from this rule (if any) will outweigh the enormous compliance and reporting costs imposed on all contractors.

V. Recommendations

For all the reasons stated above, the FAR Council and DOL should withdraw the Proposed Rule and Guidance. As written, the rule is unlawful, unfair, and unworkable and should not be implemented. If, however, the Administration insists on implementing the rule, it should consider the following changes:

1. Only final adjudications should be reportable. The proposed definition of “administrative merits determinations” should be changed to include only final determinations after an opportunity for hearing and after all appeals are exhausted, rather than mere allegations leveled by federal agencies.
2. Refrain from future rulemaking re: “equivalent state law.” The Administration’s decision not to define “equivalent state law” as part of this rulemaking is a clear acknowledgement of just how unworkable such a rule would be. The Administration should abandon this requirement entirely and refrain from future rulemaking or pursuing sub-regulatory activity such as issuing guidance documents, policy statements, or advisory notices on the subject.
3. The COTS exemption should extend to prime contracts. Applying the requirements to primes selling COTS items to the government runs the risk of driving commercial companies out of the federal marketplace. For good reason, the Administration exempted COTS subcontracts from the requirements of “Fair Pay and Safe Workplaces.” The FAR Council should extend this exception to contracts at all levels.
4. Subcontractors should report directly to DOL. The NAM supports the Administration’s decision to stagger the effective dates for the application of the rule and Guidance to subcontractors. We do not think subcontractors should be required to report violations, but if the FAR Council insists on implementing this requirement, then the reporting chain should be to DOL rather than a higher-tier contractor.
5. Raise the dollar threshold. As noted above, the current dollar threshold of \$500,000 is far too low and means that the requirements of “Fair Pay and Safe Workplaces” will affect a significant portion of the contracting community. Pursuant to the Regulatory Flexibility Act, the FAR Council must consider the impact of Fair Pay and Safe Workplaces on small businesses and consider less burdensome alternatives. If

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the FAR Council were to raise the threshold to somewhere between \$1-5 million, the requirements would have less of an impact on small businesses.

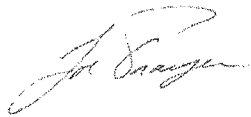
6. Clarify Scope of Reporting. Currently, the Proposed Rule is unclear as to whether the contracting entity, when part of a larger corporate enterprise, must report violations for the contracting entity alone or for the entire enterprise. Given that many contracting entities are owned by much larger parent companies, with separate data collection systems, the requirements of the proposed rule should be limited to the bidding entity.

7. Clarify Reporting Timeline. At present, the Proposed Rule is not clear as to when the semi-annual reporting is expected to occur. Rather than requiring that the reporting occur based on the date of contract award, the reporting should be consistent across all contracts—e.g., all reporting to occur April 1 and October 1. Such an approach will ease the administrative burden on contractors, many of whom will have to report information across hundreds of contracts, and might otherwise be required to report information almost every day of the year.

VI. Conclusion

For the aforementioned reasons, we respectfully urge the FAR Council to withdraw both the Proposed Rule and Guidance. We appreciate the opportunity to submit these comments. If we can be of further assistance on this matter, please do not hesitate to contact us. The DOL announced in its Guidance that it will define “equivalent state laws” as part of a future rulemaking. Without this critical definition, the Proposed Rule and Guidance are incomplete and prevent companies from fully understanding the scope of the new requirements. For this reason, the FAR Council and DOL should postpone the issuance of the final rule and guidance until the DOL has identified the “equivalent state laws” that will be covered under the requirements of EO 13673.

Sincerely,



Joe Trauger
Vice President, Human Resources Policy
National Association of Manufacturers



HOUSE COMMITTEE ON SMALL BUSINESS
Witness Disclosure Statement
 Required by House Rule XI, Clause 2(g)

Your Name: <u>Angela B. Styles</u>		
1. Are you testifying on behalf of a Federal, State, or Local Government entity?	YES	NO <input checked="" type="checkbox"/>
2. Are you testifying on behalf of an entity other than a Government entity?	YES	NO <input checked="" type="checkbox"/>
3. Other than yourself, please list what entity or entities you are representing: <u>None at hearing, but did assist National Association of Manufacturers in drafting a drafted testimony</u>		
4. Please list any offices or elected positions held or briefly describe your representational capacity with the entities disclosed in question 3. <u>None</u>		
(For those testifying on behalf of a Government entity, ignore these questions below)		
5. a) Please list any Federal grants or contracts (including subgrants or subcontracts), including the amount and source (agency) which <u>you</u> have received and/or been approved for since January 1, 2013: <u>None</u>		
b) If you are testifying on behalf of a non-governmental entity, please list any federal grants or contracts (including subgrants or subcontracts) and the amount and source (agency) received by the <u>entities listed under question 3</u> since January 1, 2013, which exceeded 10% of the entities' revenues in the year received:		
6. If you are testifying on behalf of a non-governmental entity, does it have a parent organization or an affiliate who you specifically do not represent? If so, list below:	YES	NO <input checked="" type="checkbox"/>

Signature: Angela B. Styles Date: 9/20/15



September 28, 2015

Chairman Richard Hanna
Subcommittee on Contracting and Workforce
U.S. House of Representatives
2361 Rayburn House Office Building
Washington, DC 20515

Ranking Member Mark Takai
Subcommittee on Contracting and Workforce
U.S. House of Representatives
B-343C Rayburn House Office Building
Washington, DC 20515

Chairman Crescent Hardy
Subcommittee on Investigations, Oversight, and
Regulations
U.S. House of Representatives
2361 Rayburn House Office Building
Washington, DC 20515

Ranking Member Alma Adams
Subcommittee on Investigations, Oversight, and
Regulations
U.S. House of Representatives
B-343C Rayburn House Office Building
Washington, DC 20515

Dear Chairmen Hanna and Hardy and Ranking Members Takai and Adams:

On behalf of Associated Builders and Contractors (ABC), a national construction industry trade association with 70 chapters representing nearly 21,000 chapter members, I am writing in regard to your joint subcommittee hearing, "The Blacklist: Are Small Businesses Guilty Until Proven Innocent?" The president's "Fair Pay and Safe Workplaces" Executive Order (E.O.) 13673 is another example of the White House circumventing congressional authority and disrupting fair and open competition in federal contracting. Enclosed are ABC's comments on the E.O., which address our concerns in greater detail.

ABC has been a vocal opponent of the E.O. since it was issued on July 31, 2014. ABC and the business community were active participants during the rulemaking process, through discussions with administration officials and by submitting comments in response to the proposal. It is clear this policy will give the Obama administration an opportunity to subjectively create what is tantamount to a "blacklist" of federal contractors that would not be permitted to compete for federal work, similar to the controversial proposal offered by the Clinton administration in the 1990s. At best, this E.O. creates a host of unintended problems for federal contracting officers and federal contractors that will seriously disrupt the federal procurement process and ultimately increase costs to taxpayers.

This E.O. is likely to result in the needless debarment of qualified federal contractors, while entirely circumventing longstanding suspension and debarment procedures concerning labor and workplace violations that are already part of the federal contracting process. It could prevent numerous small businesses from entering into or renewing contracts with the federal government—effectively jeopardizing workers whose jobs are tied to their employer's federal contracts.

The "Fair Pay and Safe Workplaces" E.O. is a job killer that creates an unworkable reporting and compliance burden for federal contractors, and will increase costs to taxpayers by reducing competition from contractors providing critical goods and services to the federal government. Such a draconian change in longstanding

federal contracting rules will irreparably harm good companies attempting to comply with complicated and evolving laws that federal agencies have a hard time complying with in many instances.

We thank you for addressing this important issue and look forward to working with Congress to improve and streamline the federal procurement process in a way that will result in better outcomes for taxpayers, small businesses and American workers.

Sincerely,



Kristen Swearingen

Senior Director, Legislative Affairs

Enclosure: FAR Case 2014-025, Comments on the Proposed Federal Acquisition Regulation; Federal Pay and Safe Workplaces (RIN 9000-AM81); Comments on the Proposed Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces" (ZRIN 1290-ZA02)



VIA ELECTRONIC SUBMISSION

August 26, 2015

General Services Administration
Regulatory Secretariat (MVCB)
ATTN: Ms. Flowers
1800 F Street NW, 2nd Floor
Washington, DC 20405

Tiffany Jones
U.S. Department of Labor
Room S—2312
200 Constitution Avenue NW
Washington, DC 20210

**Re: FAR Case 2014-025, Comments on the Proposed Federal Acquisition Regulation;
Federal Pay and Safe Workplaces (RIN 9000-AM81); Comments on the Proposed
Guidance for Executive Order 13673, “Fair Pay and Safe Workplaces” (ZRIN 1290-
ZA02)**

Dear Ms. Flowers and Ms. Jones:

Associated Builders and Contractors, Inc. (ABC) submits the following comments in response to the above-referenced Notice of Proposed Rulemaking (NPRM or Proposed Rule), published in the Federal Register on May 28, 2015, by the Federal Acquisition Regulatory (FAR) Council, and to the Department of Labor’s Notice of Proposed Guidance (NPG or proposed guidance) published the same day.¹

The NPRM/NPG seeks to implement Executive Order 13673 (“Fair Pay and Safe Workplaces”), by amending 48 CFR parts 1, 4, 9, 17, 22 and 52. The proposed amendments require federal contractors and subcontractors for the first time to disclose any “violations” of 14 federal labor laws occurring in the three years prior to any procurement for federal government contracts/subcontracts exceeding \$500,000, in addition to requiring updated

¹ 80 Fed. Reg., at 30548. Though published separately, the FAR Council’s NPRM is heavily dependent on and substantially interrelated with the Labor Department’s NPG. ABC believes it is therefore appropriate and more efficient to consolidate its comments on both documents and submit the same consolidated comments to each of the agencies. The proposed rule and proposed guidance will hereafter be referred to collectively as the “NPRM/NPG” or the “proposals.”

disclosures of labor law violations every six months while performing covered government contracts. The proposals also require contractors/subcontractors to include among their disclosed violations an unprecedented list of court actions, arbitrations and “administrative merits determinations” set forth in the Department of Labor’s NPG, including many forms of agency actions that merely allege violations without having been fully adjudicated. The proposals further require each contracting agency’s contracting officers (COs) for the first time to attempt to determine whether companies’ reported violations of the above-referenced labor laws render such offerors “non-responsible” based on “lack of integrity and business ethics.” The proposals also require each contracting agency to designate an agency labor compliance advisor (ALCA) to assist COs in determining whether a company’s actions rise to the level of a lack of integrity or business ethics. The proposals also require each contractor/subcontractor that is forced to report violations of labor laws to demonstrate “mitigating” efforts and/or enter into remedial agreements or else be subject to a finding of non-responsibility for contract award, suspension, debarment, contract termination or nonrenewal, all in a manner inconsistent with due process under the 14 federal labor laws referenced in the NPRM.

In addition, the NPRM/NPG requires covered contractors/subcontractors for the first time to report to their employees detailed information, including hours worked, overtime hours, pay, and any additions to or subtractions from pay, as well as notifying such individuals whether they are independent contractors. Finally the NPRM/NPG proposes to prohibit covered contractors/subcontractors from requiring their employees to agree to submit to arbitration any Title VII claims in addition to sexual assault and sexual harassment claims, in direct violation of the Federal Arbitration Act.

As further explained below, ABC opposes all of the above-referenced proposals by the NPRM/NPG, and other related changes. Both the NPRM and NPG are unlawful, impracticable, and extremely burdensome to taxpayers and to government contractors, particularly small businesses in the construction industry. Both the executive order and the proposals to implement it should be rescinded in their entirety.

About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association representing nearly 21,000 chapter members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC member contractors employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value. This process assures that taxpayers and consumers will receive the most for their construction dollar. Many ABC members currently perform government contracts exceeding the threshold for coverage by the proposed NPRM/NPG. Indeed, a recent survey of federal government construction contracts listed at USASpending.gov indicated that ABC members performed

more than 56 percent of all federal government construction contracts exceeding \$25 million during the last five years.²

The proposal will have a significant and broad impact on the entire construction industry. For example, in 2014, there was \$962.057 billion worth of construction put in place.³ Of that amount, \$275.698 billion was public construction, and \$22.735 billion of that was federal construction.⁴ We estimate the vast majority of the federal construction put in place is subject to the new proposals, as few federal construction contracts are below the \$500,000 proposal threshold. In addition, the proposals improperly impose reporting requirements on employers based upon their performance of work *unrelated* to the performance of their government contracts, by apparently requiring reports of alleged violations arising on *non*-government projects regardless of size and regardless of the private or public nature of the work being performed.

1. Background

Congress presently authorizes federal agencies to make responsibility determinations in federal procurements based on, among other criteria, each offeror's "satisfactory record of integrity and business ethics."⁵ However, until now, contracting officers generally have restricted their exercise of this power to those circumstances where contractors or subcontractors have been found to have committed serious crimes or acts of fraud or similarly serious civil matters.⁶ There are sound practical and legal reasons for this longstanding practice. Federal agencies have rightly focused on contractor transgressions that are directly correlated to contract performance, and courts have required contracting officers to afford due process rights to contractors accused of ethics violations.⁷ Rather than attempting to determine contractor integrity based on mere complaints or ongoing litigation in areas of law where contracting officers themselves lack judgmental expertise, such determinations are generally made only upon reports of final adjudications proving violations that call into question the ethical ability of contractors to perform government contracts.

During the course of many decades, neither Congress, nor the FAR Council, nor the Department of Labor has deemed it necessary, practicable or appropriate for contracting officers to make responsibility determinations based on alleged violations of labor and

² <http://www.thetruthaboutplac.com>. As reported on June 24, 2015, ABC members performed 569 government construction contracts exceeding \$25 million from FY 2009-FY2014, with a total contract value exceeding \$35 billion.

³ See U.S. Census Bureau, accessed 8/21/15 <http://www.census.gov/construction/c30/xls/total.xls>

⁴ See U.S. Census Bureau, accessed 8/21/15 <http://www.census.gov/construction/c30/xls/federal.xls>

⁵ 41 U.S.C. § 113.

⁶ See, e.g., CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation*, at 6 (Jan. 4, 2013); citing *Traffic Moving Sys.*, Comp. Gen. B-248572 (Sept. 3, 1992) (officers' criminal convictions); *Standard Tank Cleaning Corp.*, Comp. Gen. B-245364 (Jan. 2, 1992) (repeated violations of state law); *Drexel Indus., Inc.*, Comp. Gen. B-189344 (Dec. 6, 1977) (integrity offenses that are grounds for suspension under the FAR); *Greenwood's Transfer & Storage Co., Inc.*, Comp. Gen. B-186438 (Aug. 17, 1976) (pending debarment).

⁷ See *Old Dominion Dairy Prods., Inc. v. Sec'y of Def.*, 631 F.2d 953 (D.C. Cir. 1980).

employment laws. Instead, where Congress has chosen to authorize suspension or debarment of government contractors, it has done so expressly in a narrow category of labor laws directly applicable to government contracts, and even then only after final adjudications of alleged violations by the Department of Labor, with full protection of contractors' due process rights.⁸ At the same time, in passing federal labor and employment laws that apply to private employers outside the field of government contracts, Congress has created a variety of different remedial requirements to compel compliance by employers, which were the product of careful balancing of competing interests by Congress.⁹ Congress did not authorize the executive branch to impose the "supplemental sanction" of debarment on employers that violate these laws.¹⁰ Congress certainly did not authorize federal contracting officers to disqualify employers from being awarded government contracts based solely upon alleged violations of these laws, in the absence of final adjudications and the protections of due process of law.

As further explained in ABC's comments below, it is plain that the new proposals will improperly disrupt the balanced labor law schemes established by Congress, to the detriment of taxpayers, contractors and the procurement process. The sanctions imposed by the NPRM/NPG are unprecedented in their scope and exceed the president's authority. If finalized in anything like their present form, the proposals will impose draconian new obligations on government contractors and will greatly increase the risks contractors will confront in performing services for the government. Finally, the proposals will encumber the government contracting process with impracticable and unworkable restrictions that will injure competition and degrade the services received by the federal government. All of these outcomes will be particularly harmful to government contractors in the construction industry, which will be the particular focus of ABC's comments below.

2. The Proposals Impermissibly Engraft an Unauthorized New Sanction Mechanism Onto 14 Labor Law Enforcement Programs Established by Congress

The NPRM/NPG gives little attention to the careful balance of remedies and sanctions already established by Congress in existing labor and employment laws (described above). Instead, the proposals undermine the Constitution's separation of powers by substituting the president for Congress in the exercise of legislative authority.

⁸ CRS Report RL34753, *Debarment and Suspension of Government Contractors* (2013), describing the procedures for suspension and debarment authorized under such labor laws as the Davis-Bacon Act, 40 U.S.C. 3144; the Service Contract Act, 41 U.S.C. 6705; Executive Order 11246; Section 503 of the Rehabilitation Act, 29 U.S.C. 793; the Vietnam Veterans Readjustment Act, 38 U.S.C. 3696; and Executive Order 13658, all of which apply exclusively to government contracts and/or government-assisted contracts.

⁹ Such laws include the National Labor Relations Act, 29 U.S.C. 151, Title VII of the Civil Rights Act, 42 U.S.C. 2000e, the Fair Labor Standards Act, 29 U.S.C. 201, the Family and Medical Leave Act, 29 U.S.C. 2601, the Americans With Disabilities Act, 29 U.S.C. 706, the Age Discrimination in Employment Act, 29 U.S.C. 621, and the Occupational Safety and Health Act, 29 U.S.C. 553.

¹⁰ *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986); see also *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1344 (applying NLRA preemption to federal executive order "encroaching on NLRA's regulatory territory.").

As noted above, the 14 federal labor/employment laws referenced in the proposals fall into two categories with regard to disqualification of employers from performing government contracts. Six of the laws are limited in their coverage to government contractors, and within those limits these laws expressly authorize suspension and/or debarment of government contractors that violate their provisions under limited circumstances that include full protection of due process rights and final adjudications.¹¹ The remaining eight laws apply broadly to private employers, regardless of whether they perform government contracts, and these laws contain no provisions authorizing disqualification of government contractors that violate their provisions.¹² ABC contends that the new proposals violate both types of laws.

Turning first to the “government contractor laws,” ABC members performing government contracts are most commonly impacted by the Davis-Bacon Act (DBA), which applies exclusively to construction contracts.¹³ Under that law, violators may have payments on their contracts withheld, or be debarred for a period of three years, but only after a hearing has been held in which the DOL proves they committed a “willful” or “aggravated” violation.¹⁴ The post-hearing findings of the administrative law judge and the agency must be thorough, as opposed to “general and conclusory.”¹⁵ Debarred contractors also are entitled to judicial review of the department’s suspension and debarment decisions.¹⁶

Moreover, six months after a contractor or subcontractor is debarred under the DBA, it can request that the administrator of the Wage and Hour Division permit it to contract with the government. The administrator considers, among other factors, the contractor or subcontractor’s “severity of the violations, the contractor or subcontractor’s attitude towards compliance, and the past compliance history of the firm.” If the administrator denies the contractor’s request, the contractor can petition for review by the Administrative Review Board.¹⁷

The new proposals at issue here dispense with all of the foregoing hearing and adjudicatory requirements of the DBA, as well as the reinstatement process. The proposals plainly violate the DBA, as well as conflict with the DOL’s longstanding regulations and deny contractors their constitutional rights of due process.

The new proposals similarly conflict with longstanding suspension and debarment procedures under the Service Contract Act. Again, under that law applicable to service contractors, including many ABC members that perform non-construction maintenance work for the government, a hearing is required before a contractor can be debarred.¹⁸ However, similar to the DBA, the

¹¹ See note 6 above, listing the laws aimed at federal contractors.

¹² See note 7 above, listing the labor and employment laws that are not limited in their coverage to government contractors.

¹³ 40 U.S.C. 3141.

¹⁴ 40 U.S.C. § 3144; 29 C.F.R. § 5.12; e.g., *Facchiano Construction Co v. Dep’t of Labor*, 987 F.2d 206, 214 (3d Cir. 1993) (requiring knowledge on the part of the corporate officer).

¹⁵ *Griffin v. Reich*, 956 F.Supp. 98, 110 (D.R.I. 1997). See also *Pythagoras General Contracting Corp., Stanley Petsagourakis*, 2011 WL 1247207, at *13 (Mar. 1, 2011).

¹⁶ *Facchiano Construction*, *supra* n.12.

¹⁷ 29 C.F.R. § 5.12(c).

¹⁸ 41 U.S.C. 6706(b); *Dantran, Inc. v. Dep’t of Labor*, 246 F.3d 36, 45-46 (1st Cir. 2001).

contractor has an opportunity to show that it should not be debarred based on “unusual circumstances,” including the (lack of) history of violations and aggravated circumstances.¹⁹ Contrary to the SCA, the proposed rule and guidance afford neither a hearing before a contractor can be debarred, nor an opportunity for the contractor to reverse a debarment order if there are unusual circumstances.

Finally, ABC is deeply concerned with how the new proposals appear to conflict with longstanding DOL regulations implementing affirmative action compliance obligations under Section 503 of the Rehabilitation Act, the Vietnam Era Veteran’s Readjustment Assistance Act, and Executive Orders 11246 and 13658.²⁰ Again, contractors that violate these statutory and regulatory provisions may be debarred under aggravated circumstances from receiving future contracts or terminated from ongoing government work. However, a contractor is entitled to a formal hearing before any of these sanctions can be imposed.²¹ Again, the NPRM/NPG directly contradicts these statutory and regulatory schemes, in violation of applicable laws.

Equally as egregious, if not more so, is the manner in which the new proposals ignore congressional intent in enacting the second category of laws referenced above, which apply to private employers generally and which authorize no disqualification of employers from performing government contracts.

Most prominent among this category of laws whose violations are included within the proposals is the National Labor Relations Act (NLRA). It is well settled that the National Labor Relations Board (NLRB) is the sole and exclusive authority designated by Congress to address and remedy any claimed violations of the NLRA.²² Moreover, the NLRB itself is restricted by Section 10(c) to issuing “make whole,” non-punitive remedial orders tailored to the unfair labor practices being redressed.²³ Directly contrary to the new proposals, the Supreme Court has expressly held that governments are not permitted to impose “supplemental sanctions,” including disqualification from government contracts, as remedies for violations of the NLRA.²⁴ Significantly, in *Gould*, the Supreme Court declared unlawful a state’s attempt to disqualify even those contractors that had been found by judicially enforced orders to have violated the NLRB on multiple occasions during a five-year period. The current proposals are significantly worse because they threaten

¹⁹ 29 C.F.R. § 4.188; *Bither v. Martin*, 995 F.2d 230 (9th Cir. 1993).

²⁰ See note 6 above for citations.

²¹ See 41 C.F.R. § 60-741.66(a-d) (“Sanctions and penalties,” Section 503); 41 C.F.R. § 60-300.66(a-d) (“Sanctions and penalties,” VEVRAA). Similarly, a contractor may be debarred for violating Executive Order 11246, but only after the contractor has been afforded the opportunity for a hearing. 41 C.F.R. § 60-1.27(a-b) (“Sanctions”); Executive Order 11246 §§ 208(b), 303(c). See, e.g., *OFFCP v. O Melveny & Myers LLP*, ARB Case No. 12-014, 2013 WL 4715032 (2013) (remanding to ALJ allegations that respondent violated Section 503, VEVRAA, and Executive Order 11246); *OFFCP v. Bridgeport Hospital*, ARB Case No. 00-034, 2003 WL 244810 (2003) (upholding order of ALJ dismissing citation of noncompliance with Section 503, VEVRAA, and Executive Order 11246).

²² *Garmon v. NLRB*, 359 U.S. 236 (1959).

²³ See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900 (1984); *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 348 (1938).

²⁴ *Wisconsin Dep’t of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986).

contractors with disqualification merely upon issuance of an unadjudicated administrative complaint.

The foregoing preemption doctrine applied in *Gould* has by no means been limited to state government actions inconsistent with the NLRA. The same legal principles have been applied to the federal executive branch. Thus, in *Chamber of Commerce v. Reich*, the court found that regulations issued under an executive order issued by President Clinton dealing with striker replacements “promise[d] a direct conflict with the NLRA, thus running afoul” of preemption doctrine.²⁵ It is also significant that in both *Gould* and *Reich*, the courts rejected the government’s claims to being exempt from preemption under the “market participant” doctrine and/or the Federal Procurement Act. In both cases, the courts stressed that the government’s actions were “regulatory” in nature because they “disqualified companies from contracting with the Government on the basis of conduct unrelated to any work they were doing for the Government.”²⁶

For similar reasons, the new proposals violate such generally applicable employment laws as the Fair Labor Standards Act, the Occupational Safety and Health Act, Title VII of the Civil Rights Act, and similar discrimination laws cited in the proposals as potentially disqualifying to government contractors that violate them. In each of these laws, Congress established “unusually elaborate remedies,”²⁷ including by way of example under the FLSA, civil and criminal prosecution and fines, liquidated damages and enhanced penalties for “willful” violations. Notably missing from any of these statutes is authorization for any government agency to disqualify employers from performing federal government contracts. Certainly absent is any Congressional authorization for such disqualifications to occur in the absence of final adjudication of liability against such contractors in a court of law. Again, the NPRM/NPG violates the plain language of each of the statutes cited as grounds for potential disqualification of contractors.²⁸

Equally problematic is the claimed authority of agency COs and ALCAs to determine on their own whether reported violations of the 14 cited labor laws are “serious,” “willful,” “repeated” or “pervasive.” Some of these terms already have been defined by Congress in the labor laws covered by the NPRM, but some terms such as “pervasive” do not appear in any of the statutes and others are defined by the NPRM and DOL guidance in ways that are inconsistent with legislative intent.

The definitions contained in the DOL guidance are overly expansive and vaguely defined, leaving agency officials far too much discretion to assess violations based on inherently subjective factors.²⁹ According to the proposals, each contractor’s disclosed violations will be

²⁵ 74 F.3d 1322 (D.C. Cir. 1996), expressly rejecting the government’s claim that the executive order at issue was somehow authorized by Federal Property and Administrative Services Act (Procurement Act), 40 U.S.C. 101.

²⁶ See *Building & Const. Trades Dep’t, AFL-CIO v. Allbaugh*, 295 F.3d 28, 35 (D.C. Cir. 2003).

²⁷ *Kendall v. City of Chesapeake*, 174 F.3d 437, 443 (4th Cir. 1999).

²⁸ See also *Anderson v. Sara Lee Cop.*, 508 F.3d 181, 191 (4th Cir. 2007).

²⁹ See, e.g., 80 Fed. Reg., at 30586 (to determine whether a violation is “willful,” the “focus is on whether the enforcement agency, court, arbitrator or arbitral panel’s findings support a conclusion that, based on all of the facts

“assessed on a case-by-case basis in light of the totality of the circumstances, including the severity of the violation or violations, the size of the contractors, and any mitigating factors. The extent to which a contractor has remediated violations . . . including agreements entered into by contractors with enforcement agencies, will be given particular weight in this regard.”³⁰

The proposals do not explain how the new assessments will be made in a manner that is consistent with congressional intent underlying each of the 14 federal laws whose violations must be assessed. Whereas the time-honored agency and judicial review procedures embedded in each of these labor statutes promote fairness and consistency, the NPRM/NPG can only lead to increased uncertainty and arbitrary agency action. It will be unclear to entities subject to the regulation (if finalized) which and how many labor law “violations” cause them to lose a contract.

Like contractors, federal agencies are required to obey the laws as they are written. Both the FAR Council and the Labor Department have a Constitutional duty to implement the president’s executive orders in a manner that is consistent with congressional intent, and to refuse to implement an executive order to the extent that it violates the laws written by Congress.³¹ The NPRM/NPG fails to meet this Constitutional standard and must be rescinded or drastically rewritten.

3. The Proposed Rule Violates Due Process by Punishing Contractors Based on Non-Final Decisions and Without the Opportunity for a Hearing

Even if the 14 federal labor laws cited above permitted contractors to be disqualified from federal government contracts based on final court adjudications, which they do not, the current proposals would have to be rescinded because they threaten to deprive contractors of their rights to due process under the U.S. Constitution. The proposals specifically threaten disqualification of contractors based on mere allegations of misconduct without a hearing or trial or judicial review. The proposed rule requires contractors to report many types of adverse administrative actions that are not final—where no hearing has been held and no ultimate agency determination has been issued or reviewed by the courts.³²

In a recent survey of its membership, ABC found that more than 12 percent of the respondents have been falsely accused of violating one of the 14 labor laws. This is consistent with statistics derived from published data of the NLRB, Equal Employment Opportunity Commission and DOL, whose initiating complaints, cause determinations, and charging letters are now being put forward by the new proposals as potential grounds for disqualification. It is not at all uncommon

and circumstances discussed in the findings, the contractor or subcontractor acted with knowledge or reckless disregard of its legal requirements”); *id.* at 30587 (whether a violation is “repeated” “turns on the nature of the violation and underlying obligation”).

³⁰ 80 Fed. Reg., at 30582.

³¹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

³² In this regard, the proposals also violate the President’s Executive Order, which sets forth the goal of disclosing only “determinations,” “awards,” “decisions,” or “judgments.” Nowhere does the EO authorize disqualification of contractors based solely on mere *allegations* of labor law violations.

for agency complaints against employers to be withdrawn or settled without any ultimate finding of wrongdoing by the employer. Such charging documents cannot form the basis for disqualifying any contractor from performing government work.

Thus, contrary to the NPRM/NPG, a complaint issued by a NLRB regional director does not constitute final agency action and is not a “finding” of any violation of the NLRA, which only the board itself can determine at the agency level.³³ Even the NLRB’s own determinations are not self-enforcing under the NLRA, as Section 10 makes clear, because only a court of appeals can enforce orders of the board—not the board itself and certainly not any other federal agency.³⁴

Similarly, OSHA citations are not in any sense “final” and should not constitute any basis for a CO to find a violation of that act to have occurred. In the experience of ABC member contractors, most OSHA citations are routinely changed after investigation and negotiation between the employer and the investigating agency, resulting in a lesser fine or type of citation. These and other non-final allegations by a single agency official do not constitute binding agency “determinations” of violations under any reasonable definition and should not be considered in contracting decisions. To contest decisions by full agency boards, an employer must generally exhaust the administrative process through the agency before challenging the agency action in federal court.³⁵ It is cold comfort that the DOL proposes that COs and ALCAs give “lesser weight” to violations that have not resulted in a final judgment, determination or order.³⁶ The potential remains under the new proposals that contractors will be disqualified from performing government work because of unadjudicated agency or judicial allegations that should be entitled to no weight at all.

Based on “similar information obtained through other sources,” the DOL’s guidance permits COs to take remedial measures up to and including contract termination and referral to the agency’s suspending and debarring official.³⁷ The contractor may be disqualified as a result of an unknown source’s mere allegation of a labor law violation. The source may be a labor union seeking to organize the contractor, and the union may have an incentive to file baseless labor law allegations. Construction trades unions regularly target ABC member contractors, which are predominately nonunion employers, for so-called “corporate” or “comprehensive” campaigns. These campaigns consist in large part of union efforts to destroy a targeted company’s reputation

³³ See *Independent Stave Co.*, 287 NLRB 741 (1987), explaining that the NLRB is alone vested with lawful discretion to determine the merits of a complaint and whether any violation of the NLRA has occurred.

³⁴ 29 U.S.C. 160. Published NLRB statistics indicate that federal appeals courts have reversed more than 30 percent of board decision during the past 40 years. <http://www.nlrb.gov> (Appellate court decisions 1974-2013).

³⁵ E.g., *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124-26 (1987) (decision of NLRB General Counsel to file a complaint does not constitute final agency action); *Northeast Erectors Ass’n v. Secretary of Labor*, 62 F.3d 37, 40 (1st Cir. 1995) (finding that federal courts lack jurisdiction to review pre-enforcement challenge to OSHA citation).

³⁶ 80 Fed. Reg., at 30590.

³⁷ 80 Fed. Reg., at 30577.

by filing numerous unsubstantiated charges of labor law violations.³⁸ The new proposals play directly into the hands of malicious third parties that seek to put unfair pressure on employers, because mere allegations of labor law violations could result in disqualification of targeted government contractors under the NPRM/NPG.

The new proposals impose other significant barriers to a fair process. For example, a CO might conclude that a contractor should not be awarded a contract based on its failure to comply with labor laws. When that contractor applies for a different contract, a second CO may use the first CO's no-contract determination in order to reduce his/her new workload or avoid inconsistency, thereby causing a *de facto* contract bar without affording the contractor due process.

In addition, because the CO's analysis of the severity of the violation will be inherently based on subjective considerations ("serious," "willful," etc.), there will be bid protests alleging favoritism (i.e., a contractor may question why it was passed over for a bid in place of an entity the contractor believes has a similar record of labor law "violations").

The reporting requirement itself is unfair to contractors that have been falsely accused of labor law violations. Information that contractors must provide under the new proposals will be subject to misuse by the public. Competitors and labor organizations can be expected to seize on non-final "violations" that a contractor must report, even though the contractor may be fully vindicated by a court, agency, or settlement months or years down the road. For example, in the experience of ABC members, it can take upwards of six months for an OSHA citation to reach final agency adjudication. Even worse, it is not uncommon for a contested NLRB complaint to take *years* to reach a final adjudication by an appeals court. As noted above, the process of agency adjudication and judicial appeal often results in the initial administrative decision being overturned—yet the NPRM/NPG unfairly sweeps these decisions within its reach, risking loss of contracts before the employer is ultimately vindicated.

4. The Proposed Rule Imposes Onerous Burdens on Contractors, Contracting Officers and Agency Labor Compliance Advisors, Which the Proposals Unfairly Minimize

Without any supporting evidence, the NPRM/NPG claims that the new proposals will improve the "economy and efficiency in procurement" in government contracting."³⁹ To the contrary, the new proposals in their present form can only impose new burdens on contractors, COs and ALCAs, as well as the entire procurement process. Compliance with these proposals will require time-consuming and highly subjective analyses of complex and specialized legal concepts that appear in each of the 14 federal laws subject to the proposed rules for a period of three years before a contract is offered. This long look-back period should be rescinded in its entirety, as it is not only overbroad, but also gives retroactive effect to non-final "violations." In addition, the requirement of updates every six months imposes heavy and unnecessary burdens on both

³⁸ There is a substantial body of documentation of union corporate campaigns and their pernicious effects on employers, particularly in the construction industry. See, e.g., Jarol Manheim, *Trends in Union Corporate Campaigns* (U.S. Chamber of Commerce 2005), available at www.uschamber.org.

³⁹ 80 Fed. Reg., at 30548.

contractors and procurement officials. The update period should be modified to at least annually. The proposals also should clarify that the updates need only be provided on a calendar year basis. If they are required six months after each contract award, then contractors performing on multiple contracts could find themselves required to file updates on a constant basis throughout each year. The \$500,000 contract coverage threshold also sweeps far too broadly. Finally, a contractor should not have to report on all of its subsidiaries if only one subsidiary has a federal contract, or if it acquires or merges with an entity that has a contract.

Given the proposed rule's scope, agencies will not realistically be able to fund this endeavor with current resources. It is far more likely that procurement agencies will be required to hire hundreds if not thousands of staff to serve as or assist the newly created ALCAs, and then will have to spend time and resources to the new staff members on the nuances of 14 federal labor laws, to say nothing of the as-yet-unidentified state laws. Neither the FAR Council nor DOL can assure the public that ALCAs will be experts in the 14 labor laws and "state law equivalents." It also will be extremely difficult, if not impossible, for prime contractors to certify the labor compliance of their supply chains of subcontractors because few, if any, contractors have the necessary expertise in all 14 labor laws now being placed at issue, not to mention the exponentially greater potential number of state laws yet to be defined.

Private and public resources should not be spent to require contractors to file public reports in this manner when the federal government already has sufficient data on whether offerors have violated federal labor laws. The FAR Council acknowledges that it has access to most of this information, yet asserts that its overbroad reporting proposal is a more efficient approach.⁴⁰ The federal government already has a robust system in place for determining whether to award contracts to entities, including the discretion not to award a contract if the entity has an unsatisfactory labor record and reference to the Federal Awardee Performance and Integrity Information System.⁴¹ The FAR Council cannot demonstrate that it has examined the relevant data and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.⁴²

The pre-award review as proposed will result in uncertainty for both contractors and the government, and will delay the procurement process. The NPRM does not explain how COs or contractors will be able to navigate the labyrinth of requirements in a timely manner without unduly delaying the procurement process.

For sizeable contractors, the infrastructure required to adequately report the contractor's "violations" will be immense under the NPRM/NPG. ABC member companies do not routinely track whether there have been any administrative merits determinations, arbitration decisions or civil actions against them—largely because many such actions are non-final and reversible. If the rule is finalized, companies will have to expend large sums on human resources, outside legal counsel, compliance and information systems to ensure this data is accurately gathered,

⁴⁰ 80 Fed. Reg., at 30562.

⁴¹ See 48 CFR part 9; 80 Fed. Reg., at 30548.

⁴² See *Motor Vehicles Mfr.'s Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

maintained and sorted. Regulated entities will have to hire officials versed in both procurement policy and labor and employment law. The proposed requirements are not merely “check the box” exercises. Even contractors without violations must engage in an arduous process to reach that conclusion.

Because no guidance on “equivalent state laws” was issued, monitoring and training systems must be updated if and when a rule is finalized on this subject. Given the proposed rule’s substantial tracking burden, if a contractor in good faith reports that it has no violations but later realize it does, it should not be penalized. The contractor should similarly be immune from penalty if the contractor later realizes through a genuine mistake that a covered subcontractor has reportable violations.

The process by which contractors communicate with COs and ALCAs about their “violations” is bound to be cumbersome, given potentially detailed communications by email and/or other modes of communication between contractors and the government concerning the violations and any mitigating circumstances. The cost of compliance will be high, and may skew particularly against small contractors, which have limited resources not only to keep track of legal allegations but to challenge frivolous ones.

The impact would be compounded by the proposed reporting requirement imposed on prime contractors regarding their subcontractors (if this requirement stands). The time requirements alone are burdensome and unrealistic. If the prime contractor awards the subcontract (or the subcontract becomes effective) within five days of the prime contract execution, then it must conduct the same analysis the contracting agency performed of the contractor within 30 days of awarding the subcontract. For all other subcontracts, review of possible reportable subcontractor violations must occur prior to the subcontract award.

For large contractors in particular, the burden to review a multitude of possible violations from hundreds of subcontractors will be tremendous. Many prime subcontractors may not have the staffing, IT or legal expertise necessary to identify and confirm the subcontractor violations that fall under the reporting requirement from those that do not. Smaller subcontractors may seek advice from the contractor’s legal counsel on such issues, creating potential ethical quandaries for counsel, whose legal responsibility does not extend to the subcontractor.

If the subcontractor cannot adequately determine its own reporting responsibilities, the contractor will be loath to retain the subcontractor—not on the basis of an actual labor law violation, but because the contractor does not want to risk an accusation that it incorrectly reported the subcontractor’s violations. ABC members also are concerned that the proposed rule will drive out small minority-owned and women-owned businesses because they do not have the resources to compile and/or assess reports of labor law violations in so many areas of labor and employment law, and will be unwilling to take the unavoidable risk of making a false statement to the government. Alternatively, to avoid the reporting requirements altogether, subcontractors may structure their bids under the \$500,000 threshold, forcing the contractor to staff a project with several low-cost subcontractors instead of one that could most efficiently perform the work.

Under the new proposals, contractors will be in the untenable situation of policing their subcontractors, and subcontractors will be in the untenable position of sharing sensitive or proprietary information with prime contractors with whom they compete on other projects. According to ABC's survey of its membership, 47 percent of respondents have performed work as both prime contractors and subcontractors on federal contracts. It is also unclear how long each contractor would have to retain the information, and whether they would be required to disclose it under federal and state public information statutes. Furthermore, already many subcontractors agree to report to the prime contractor offenses such as OSHA citations, but much of the time the subcontractors fail to actually report. The proposed self-reporting scheme is unworkable.

These considerations make the NPRM's DOL reporting alternative more palatable (between two bad choices).⁴³ However, that alternative still comes with significant practical problems. For example, under the NPRM, a prime contractor must consider whether the subcontractor is a responsible source during the term of the subcontract. If, based on the DOL's advice, the contractor concludes that the subcontractor should not be retained, it would have to quickly find a "clean" subcontractor replacement midstream during the project at a new bid price, which is no small feat. Delays would be significant, and the costs involved should not be imputed to the innocent contractor.

Adding to contracting costs, the proposed rule requires regulated entities to litigate defenses to alleged labor law violations in multiple forums. The NPRM states that when contractors and subcontractors report administrative merits determinations, they also may submit any additional information that they believe may be helpful in assessing the violations at issue, including the fact that the determination has been challenged. Additionally, contractors and subcontractors may provide information regarding any mitigating factors. The net result of these provisions will be to require contractors to litigate their defense of any claimed violations in two separate forums: at the original agency level and at the procurement level.

The threat of cancellation, suspension and debarment of contracts also may significantly impact contractors' approaches to charges, demands and matters pending before enforcement agencies, encouraging them to settle matters rather than seeking vindication of their position and thereby risking a reportable "violation" that could affect their contract rights. This is especially unfortunate because many allegations are prompted by plaintiff attorneys and unions engaged in corporate campaigns. These and other groups will no doubt file questionable labor law allegations simply to meet their financial and public relations goals, knowing the NPRM gives contractors an incentive to settle. A related concern is that unions will threaten contractors with NLRB bad faith bargaining charges or grievances that could lead to arbitration, to gain leverage during negotiation sessions. Already in the weeks since the proposed rule was issued, labor organizations have threatened contractors to yield to their bargaining demands or else be in jeopardy of losing their government contract.

⁴³ See 80 Fed. Reg., at 30555.

ABC's survey of its members reveals that more than 57 percent of respondents believe that the proposals, if finalized, will compel them to abandon the pursuit of federal contracts. Ninety-four percent of respondents believe the NPRM/NPG would make them less likely to pursue federal contracts. Finally, 99 percent of the respondents believe the new proposals will make the federal contracting process less efficient and 98 percent believe the proposals will make federal contracting more expensive.

5. The Proposed Rule Impermissibly Bifurcates This Proceeding by Failing to Present Proposals on "Equivalent State Laws"

The FAR Council deferred for a later proposed rule the executive order's "equivalent state law" disclosure requirements.⁴⁴ A new proposed rule on this subject may potentially cover hundreds of state and local laws. It is impossible to accurately gauge the massive costs to the procurement system that will result from the proposed rule without knowing its full scope. It is unclear whether contractors need to report new laws that states may enact in the future, or whether there would be a new rulemaking each time there is a change. This would create even more internal tracking contractors would have to undertake. There is no justification for such a bifurcated rulemaking process, and the first stage of the proposals should not be made final until the full magnitude of the final rule is known.

6. The New Paycheck Requirements Are Unlawful and Arbitrary

The paycheck "transparency" requirements again encroach on Congress's domain. The NPRM requires contractors for the first time to provide a document informing individuals of their independent contractor status, in addition to a wage statement. However, the DOL's proposed guidance acknowledges that the determination of independent contractor status under a particular law is governed by that law's definition of employee, leaving employers uncertain as to what definition should be used.⁴⁵ The DOL's second proposed option for the disclosure of wage statements, which requires that it contain employees' rate of pay, total hours, gross pay, and any additions or deductions, is more in line with employers' practices and is less burdensome than the first option, which also would require overtime hours or overtime earnings. Under the first option, employees can calculate whether the paycheck includes payment for overtime hours.⁴⁶ Provision of the paycheck requirements by electronic means is appropriate given the widespread use of electronic dissemination of information.⁴⁷

7. The Proposed Ban on Arbitration Agreements Violates Federal Law

The proposed rule broadly prohibits arbitration agreements covering claims arising under Title VII, as well as all tort claims related to sexual assault or harassment, with limited exceptions. These restrictions conflict with the U.S. Supreme Court's decision in *CompuCredit v.*

⁴⁴ 86 Fed. Reg., at 30554.

⁴⁵ 80 Fed. Reg., at 30593.

⁴⁶ 80 Fed. Reg., at 30592.

⁴⁷ 80 Fed. Reg., at 30592-93.

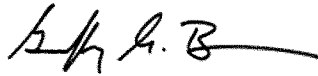
Greenwood, 132 S.Ct. 665 (2012), and other similar rulings upholding the enforceability of arbitration agreements under the Federal Arbitration Act. An agency cannot by the stroke of a pen eliminate pre-dispute arbitration, yet the FAR Council proposes just that.

Conclusion

For each of the reasons set forth above, ABC urges the FAR Council and DOL to withdraw their unlawful and unwise proposals.

Thank you for the opportunity to submit comments on this matter.

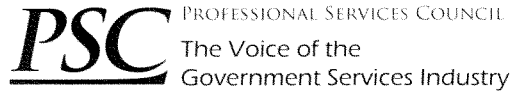
Respectfully submitted,

A handwritten signature in black ink, appearing to read 'G. Burr', with a long horizontal flourish extending to the right.

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Statement for the Record of the
Professional Services Council

"The Blacklist: Are Small Businesses Guilty Until
Proven Innocent?"

Subcommittee on Contracting and the Workforce

House Committee on Small Business

U.S. House of Representatives

September 29, 2015

Introduction

The Professional Services Council commends the Subcommittee on Contracting and the Workforce for holding this hearing and appreciates the opportunity to provide a written statement for the record.¹ The issue of today's hearing is an important one with a long history and its effects must be fully understood and considered before there should be any consideration of imposing its requirements on contractors.

PSC supports the logical premise that it is unfair that contractors with repeated, willful, and pervasive violations of labor laws gain a competitive advantage over the vast majority of contractors that are acting diligently and responsibly to comply with a complex web of labor requirements. That said, we are strongly opposed to Executive Order 13673 signed on July 31, 2014, and its implementation tools, because they go far beyond the Executive Order's stated intent and are unnecessarily excessive, largely unworkable and unexecutable. More specifically, the Executive Order will act as a de facto blacklisting of well-intentioned, ethical businesses, further restrict competition for contracts, create procurement delays, and add to the cost of doing business with the government. And despite its laudable intent, the Executive Order will also create significant new implementation and oversight costs for the government for what even the administration acknowledges is a relatively small problem.

In simple terms, this Executive Order lacks crucial, fundamental characteristics of fairness, logic, and objectivity. The same is true about the Executive Order's implementing tools—a Federal Acquisition Regulation proposed rule² and Department of Labor (DoL) proposed guidance³ issued simultaneously on May 28, 2015. In fact, the DoL proposed guidance is far more aggressive than what is required by the Executive Order and in many aspects is incomplete. PSC commented extensively on the proposed rule and guidance via our participation in the Council of Defense and Space Industry Associations (CODSIA), which we have added as an appendix to this written statement.⁴ If fully implemented, the Executive Order will have a significant negative affect on law abiding small businesses already performing in the federal market and will act as a substantial barrier to any small business seeking to do business with the Federal government.

¹ For 40 years, PSC has been the leading national trade association of the government technology and professionals services industry. PSC's nearly 400 member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the association's members employ hundreds of thousands of Americans in all 50 states. See www.pscouncil.org.

² Fair Pay and Safe Workplaces FAR Proposed Rule, 80 Fed. Reg. 30548 et seq, May 28, 2015, available at <http://www.gpo.gov/fdsys/pkg/FR-2015-05-28/pdf/2015-12560.pdf>.

³ Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces", 80 Fed. Reg. 30574 et seq, May 28, 2015, available at <http://www.gpo.gov/fdsys/pkg/FR-2015-05-28/pdf/2015-12562.pdf>.

⁴ CODSIA Comments on Fair Pay and Safe Workplaces proposed implementing regulations, August 28, 2015, available at www.pscouncil.org/PolicyIssues/LaborIssues/Comments_on_Fair_Pay_and_Safe_Workplaces.aspx.

About the Executive Order

Executive Order 13673 (E.O.) seeks to ensure that only those contractors who abide by a myriad of federal and “equivalent” state labor laws are permitted to receive federal contracts.⁵ The E.O. and its supporting materials state that the E.O. is necessary because of instances in which companies have failed to comply with existing laws related to wage requirements, workplace safety, and employer anti-discrimination. However, the White House also recognizes that the “vast majority of federal contractors play by the rules,”⁶ which itself raises serious questions about the necessity of such a sweeping and significant new compliance regime.

To achieve its intended goal, the E.O. would require that federal procurements for goods and services over \$500,000 include a provision in the solicitation requiring every prospective contractor (offeror) to represent, to the best of the offeror’s knowledge and belief, whether there have been any administrative merits determinations, arbitral award decisions, or civil judgments—that were undefined in the Executive Order but are defined in the DoL proposed guidance—rendered against the offeror within the preceding three year period, for violations of 14 enumerated federal labor laws and their equivalent state laws. Examples of the laws that would be covered by the E.O. include the Fair Labor Standards Act (FLSA), Occupational Safety and Health Act (OSHA), the National Labor Relations Act, the Davis-Bacon Act, and the Service Contract Act.

Based on the information received from offerors, government contracting officers must make a determination about each offeror’s present responsibility, thus determining whether the offeror is suitable for a contract award.

If awarded the contract, the awardee must require all of their subcontractors to also disclose to the awardee any of its labor-related findings or violations and the awardee must evaluate every disclosure by a subcontractor and make a determination regarding whether that subcontractor is a “presently responsible sources” with satisfactory records of integrity and business ethics.

The E.O. would also create a new function within each agency and require the appointment of a senior agency official to serve as the “Labor Compliance Advisor” (LCA). It tasks LCAs with assisting agency contracting officers with making decisions about contractors’ compliance with labor laws and whether contractors are “presently responsible.” The LCA is also to provide assistance to the agency suspension and debarment official when initiating suspension and debarment proceedings. Finally, the E.O. requires DoL to assist prime contractors with making their decisions about their subcontractors’ “present responsibility.” To our knowledge, no mechanism exists today within DoL for providing such assistance to prime contractors.

⁵To date, there is no federal requirement that imposes a contractual obligation to comply with state labor laws. The E.O. will require the Department of Labor to determine when labor laws are “equivalent.”

⁶Fact Sheet: Fair Pay and Safe Workplaces Executive Order, available at <http://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order>.

History

The Fair Pay and Safe Workplaces Executive Order is similar in several respects to previous initiatives under the Clinton administration. PSC is familiar with this history because, at that time, PSC's President and CEO Stan Soloway was a deputy undersecretary of defense and served as the primary lead for DoD on those proposed rules. As Soloway stated during his February 26, 2015 testimony during a House Education and Workforce hearing:⁷

“even at that time, there was a great deal of concern across the administration about whether that proposed rule was fair or implementable and whether it would hinder the Defense Department’s (or other agencies’) ability to effectively partner with essential and “responsible” private sector entities. In my view, those concerns remain valid today, as well, particularly since this E.O. goes well beyond the prior version.”

As you may know, building on a commitment from then-Vice President Gore in 1996, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council in 2000 published a proposed rule called the “Contractor Responsibility Rule.”⁸ The driving force behind the proposal was actually a single case, albeit a significant one, involving a company with scores of labor violations. At stake was the core question of whether a company could be denied a federal contract solely on the basis of violations unrelated to its ability to perform on the contract. Many in the federal acquisition field believed the concept of “present responsibility,” a fundamental concept of federal acquisition law then and today, said that the answer to the question was “yes.” However, others disagreed and the company was awarded additional work. As a result, as one of its last regulatory acts, the Clinton administration issued the final version of the “Contractor Responsibility Rule.”⁹ Then, as now, the intent was laudable. But then, as now, the rule was poorly thought-out, overly broad, and completely unexecutable. And, as you may also know, the final rule was rescinded by the incoming Bush administration just a few weeks later.

Since then, however, the issue at the heart of that debate—the government’s ability to deny a contract award on the basis of broad compliance with federal law—has largely been settled. Over the last decade, numerous cases, from Enron to British Petroleum, have repeatedly demonstrated the government’s authority to deny contract awards to companies with documented, pervasive, and willful violations of law, even when those violations were entirely unrelated to the company’s performance on a government contract. Nonetheless, the Fair Pay and Safe Workplaces E.O. shares many of the same attributes as its Clinton-era predecessor: it is poorly

⁷ Written Statement of Stan Soloway, President and CEO of the Professional Services Council, before a joint hearing of the Workforce Protections and Health, Employment, Labor, and Pensions Subcommittees of the House Education and Workforce Committee, February 26, 2015, available at http://www.pscouncil.org/PolicyIssues/LaborIssues/GeneralLaborIssues/Testimony_on_Fair_Pay_and_Safe_Workplaces_Executive_Order.aspx.

⁸ 65 Fed Reg 40830, et seq, published on June 30, 2000, available at <http://www.gpo.gov/fdsys/pkg/FR-2000-06-30/pdf/00-16266.pdf>.

⁹ 65 Fed Reg 80256, et seq, published on Dec. 20, 2000, available at <http://www.gpo.gov/fdsys/pkg/FR-2000-12-20/pdf/00-32429.pdf>.

thought-out and constructed, overly broad and of fundamentally questionable fairness. It is also unnecessary. There is no debate today about whether pervasive violations of law, including federal labor laws, can be used as the reason to deny future federal contracts to a company through existing suspension and debarment procedures. And there is no real debate as to whether the government already has at its disposal any number of tools to penalize bad actors.

Challenges

As stated previously, this E.O. and its implementing tools pose a number of challenges that renders this E.O. unworkable. They also create a number of unintended consequences, and most notably, are completely unnecessary. While we learn more about the adverse effects of the E.O. every day, there are many aspects that we will not know about until well into implementation. I hope we do not get to that point because this E.O. has too many undefined terms, too few objective standards, and too much potential for adversely affecting the federal procurement process.

The Executive Order is Unnecessary

There is no evidence of a widespread problem of pervasive, repeated or willful violations of labor laws by federal contractors. As the White House Fact Sheet accompanying the E.O. states, the vast majority of contractors play by the rules. That is not to say that there are not instances where contractors have violated labor laws. And some of these infractions may well have been intentional. The courts have even found that the U.S. Government has violated the Fair Labor Standards Act for some of its employees. But the fact is that the labor laws involved are so complex and challenging to execute that many companies, sometimes at the direction of the government itself, take actions that result in honest mistakes. Yet, each mistake is, technically, a violation of law and these honest, administrative errors make up the vast bulk of such “violations.” Beyond that, there are numerous existing mechanisms and processes available to federal agencies that are more suitable and less intrusive than the E.O. for dealing with those cases in which there has been nefarious intent.

First, contracting officers are already required to evaluate each offeror to determine whether it is a “responsible” contractors, and that evaluation is based on the totality of the contractor’s performance history. FAR 9.104 states that such determination is to include whether the contractor has a satisfactory record of integrity and business ethics. To assist contracting officers with making such determinations, contracting officers are required to review government maintained databases, including what was called the Excluded Parties List System (EPLS)—which lists all suspended or debarred contractors—and the Federal Awardee Performance Information and Integrity System (FAPIS), which contains information about previous non-responsibility determinations, contract terminations, and any criminal, civil and administration agreements in

which there was a finding or acknowledgement of fault by a contractor tied to the performance of a federal contract.

In addition, under FAR 9.4, which outlines the federal government's suspension and debarment structure, federal agencies have the authority to suspend or debar a contractor for a number of enumerated actions, including for "commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor." This catch-all provision provides the necessary authority for initiating suspension and debarment action against a contractor for violations of, among other things, federal labor laws. This authority is also reiterated in several places on the DoL website, and specifically on DoL's published fact sheets outlining the penalties for contractor violations of the Service Contract Act.¹⁰ In addition to the FAR suspension and debarment process, the Department of Labor has independent statutory authority to debar a contractor for significant federal labor law violations.

Examples of other existing remedies include criminal prosecutions, civil actions, substantial fines, liquidated damages, and contract terminations. Federal contractors know these actions are serious as each of them carries significant consequences. The E.O., however, fails to acknowledge that the existing remedial actions even exist, let alone are effective, and instead assumes that only stripping contractors of their contracts or denying on the president's own assertion that the vast majority of federal contractors play by the rules, the existing deterrents and the current system for reviewing and adjudicating potential violations of labor laws are working effectively. That said, we recognize that there will be bad actors. But, based on historical GAO reports and the data in Senator Harkin's report (discussed in greater detail below), it is clear that contractors that violate federal labor laws are already being identified by DoL and the procuring agencies and that action is being taken against those that violate the law.

With regard to labor law violations, it is important to recognize that it is the Department of Labor that initiates reviews and administers federal contractors' compliance with federal labor laws through a number of DoL offices, such as the Wage and Hour Division and the Office of Federal Contract Compliance Programs. As such, the result of any of their own reviews, including settlement agreements, penalties, or other punitive actions, should be known and recorded by the Department of Labor. If this is not happening, the administration would be better served by focusing on improving its own data collection and information sharing efforts rather than adopting another costly, complex compliance and reporting regime.

There is little evidence to demonstrate that the above existing authorities are not, or could not, be effective on their own, without creating new and significant bureaucracies as required by the E.O. In fact, much of the information collection that the E.O. imposes on contractors is information that the government already has.

¹⁰ DoL Fact Sheet #67: The McNamara-O'Hara Service Contract Act (SCA), July 2009, available at <http://www.dol.gov/whd/regs/compliance/whdfs67.pdf>.

Rather than creating duplicative and burdensome reporting requirements, the government should examine its existing reporting mechanisms and identify and correct any shortcomings without duplicating that effort by imposing additional requirements on industry.

The Executive Order is Excessive

Many of the most complicated challenges associated with the E.O. are created by its expansion of, or redundancy with, the current compliance regime, while providing very little additional benefit to the government. For example, the E.O. fails to limit reporting requirements to findings directly tied to federal laws only. By expanding the reporting requirements to include findings related to “equivalent state laws,” the E.O. adds significant and unneeded complexity. First, DoL does not have jurisdiction over these often disparate state laws. Second, it is unreasonable to expect that any of the LCAs will have even marginal knowledge or understanding of even a few, let alone all 50 states’ labor laws, administrative processes, and/or due process rights afforded to federal contractors who do business in those states.

Adding to the complexity of the E.O.’s inclusion of state labor laws is the fact that the E.O. does not limit reporting of state activity to violations tied to the performance of a federal contract. It is common for federal contractors to compete in the commercial marketplace in addition to the work done for the federal government, but it is also common that companies separate their federal and commercial business units for ease of complying with a myriad of other federal government-unique compliance, oversight and reporting regimes associated with federal procurements. Because of this expansive coverage, companies would have to initiate a substantial data collection effort from all business units, even if the vast majority of its total revenue is derived from its commercial business. Additionally, because the E.O. fails to limit reporting of findings to only those in which there is a finding or acknowledgement of fault by the contractor, the reporting burden will be much more intensive than necessary or appropriate to meet the objectives of the E.O.

Given the E.O.’s inclusion of state labor laws beyond those tied to a contractors’ performance of federal contracts, and the fact that there need not be a finding or acknowledgement of fault to trigger a report and review, it is easy to see just how massive a data collection and reporting effort will need to be undertaken by those companies simply wishing to bid on a federal contract. Many will sit out the competition because of it, even if there are no company violations, particularly because compliance reporting is required twice per year once a contract is won.

Ultimately, the E.O. should be focused on federal contractors, their compliance with federal laws, and on their performance of federal contracts. It is nonsensical to create a vast reporting structure that seeks to capture information that has nothing to do with the performance of federal contracts and expands well beyond fed-

eral labor laws, or in which the company was neither found to have committed, or admitted to, any wrongdoing.

Even more troublesome is the fact that the DoL proposed guidance fails to define any “equivalent” state laws beyond state occupational safety and health laws that are “OSHA-approved.” Yet, the proposed guidance grants DoL the authority to add state law “equivalents” in the future. Thus, the proposed guidance is incomplete and will result in cumulative, additional costs for contractors as DoL determines—likely without significant public input or cost impact assessment—which other state laws to cover.

In recent years there have been a few reports seeking to highlight instances in which companies with labor law violations have received, or continued to perform, federal contracts. These reports are riddled with flaws that seek to paint a picture of contractor abuse that is woefully inaccurate. One such report, published by the office of Senator Tom Harkin in December 2013, reaches back to 2007 to identify contractors with OSHA and wage violations even if those violations had nothing to do with the companies’ work under a federal contract. Also, the report included a listing of top contractors that were tied to instances in which back wages were owed to their employees. What the report failed to highlight is that, in early half of the top 15 cases listed in the report, the contractor was not at fault for the violations. Many contract-related cases involving back pay occur because the contracting agency, i.e. the government, failed to include required Service Contract Act or Davis-Bacon Act clauses or correct wage determinations into the contract. While long viewed as technical or administrative errors, they have never been objectively considered evidence of willful behavior. Yet under these circumstances, federal contractors are often adversely affected by mistakes by the government. Also concerning is that the report failed to limit its finding to cases that had been fully resolved, thus falsely inflating the appearance of contractor violations. PSC has seen time and again determinations later overturned by administrative bodies or the courts, but the E.O., like the Harkin Report, fails entirely to account for such subsequent actions.

The Executive Order is Ambiguous and Unworkable

The E.O. requirement that prime contractors mandate their subcontractors to report their violations of labor laws will be exceptionally onerous, if not impossible, for prime contractors to administer and creates a number of unintended consequences related to prime and subcontractor relationships.

First, the E.O. requires prime contractors to update their certification of compliance with labor laws every six months and requires the same reporting and certification by their subcontractors at identical intervals. The reporting burden on prime contractors for just reporting and certifying for their company is onerous in and of itself as discussed above. Adding subcontractor reporting adds a significant level of complexity to the information collection and related mitigating processes outlined in the E.O. Primarily, prime contractors cannot, and should not, be tasked with ensuring the

labor compliance of their subcontractors or their entire supply chain on a recurring basis when such compliance is entirely unrelated to the federal contract under which the prime and subcontractor are partnered. Some larger contractors, for example, have supply chains and subcontracting agreements numbering in the tens of thousands. Just to review this number of companies is unexecutable even if only a limited number of companies have a reported violation of the E.O.'s covered labor laws. But if one-third of a large companies' supply chain has even a minor violation of a covered labor law, that could be 10,000 cases that need to be reviewed by the company and possibly by both the contracting officer and the yet-to-be created Office of Labor Compliance within DoL. Not only do the companies not have the resources to conduct the reviews, the federal government would also be overwhelmed by responsibility reviews of even minor cases that would ultimately be cleared.

Second, the E.O.'s subcontractor flow-down requirement means that subcontractors will be providing sensitive business compliance information to their prime contractors. But the E.O. fails to recognize that many companies that subcontract with each other also compete against each other for other federal contracting opportunities. This business dynamic raises legitimate concerns by companies who do not want to provide information to their prime contractors because the prime contractor could use even minor infractions to gain a competitive advantage, or to initiate a contract award protest, against the company in a future acquisition in which the companies were competing against each other. Again, why is the E.O. creating a vast new reporting regime, and placing the burden on industry, to collect information that the government already has, or should have, access to through existing channels?

Third, the E.O. requires a pre-award assessment of labor compliance on a proposal-by-proposal basis. For companies that bid on multiple opportunities, these reviews mean that different contracting officers, and different LCAs, will be making assessments about a contractor's labor record and may come to different conclusions about a contractor's "responsibility" after reviewing identical information about a contractor's historical compliance with labor laws. This subjective analysis means that, in some cases, a contractor could be determined to be "presently responsible" by one contracting officer but based on identical information found to be not "presently responsible" by another contracting officer. This lack of consistency creates enormous risk and uncertainty for both the government and contractors. Alternatively, once one contracting officer or LCA makes a determination that a contractor is not a responsible source, based on their individual subjective analysis, then it is foreseeable that every other contracting officer will make the same determination to avoid inconsistency or having to justify a different conclusion. Contracting officers are not labor law experts. Since contracting officers are faced with burgeoning workloads and pressure to get contracts awarded quickly, it is also foreseeable that a contracting officer would avoid making any award to a contractor with any labor violation simply to avoid the time, burden, and delay associated with coordinating with the LCA or having to

justify making such an award. Under these scenarios, and given the fact that mere allegations would be considered during reviews, a contractor would be confronted with a de facto debarment—a “blacklisting”—without being afforded the due process that is required to be provided to contractors under existing federal acquisition regulations.

Fourth, in order for the E.O. to be implemented in a workable manner, the federal agencies would have to hire a significant number of new staff to serve as (and support) the role of the LCAs. Within the Department of Defense alone, the LCA would be required to support the activities of approximately 24,000 contracting officers and hundreds of contracting offices. Additionally, the DoL would need significant additional resources to support prime contractors seeking guidance about whether potential subcontractors’ violations warrant a decision by the prime contractor not to award a subcontract to the entity. As stated above, for some large prime contractors that have several thousands subcontractors and suppliers, the requests for assistance to the DoL could be tremendous. Even if the federal government could somehow ramp up its capacity to provide DoL and LCAs resources to the federal agencies and prime contractors, a significant amount of time would be needed to effectively train personnel in the new positions to correctly carry out their duties in a fair and consistent manner. The cost of hiring and training new personnel will be substantial.

Fifth, the E.O. is riddled with undefined and ambiguous terms that we feared would result in contractors having to report non-fully-adjudicated cases of alleged “violations.” For example, the E.O. directs contractor disclosure of any “administrative merits determination, arbitral award or decision, or civil judgment (as defined in guidance issued by the Department of Labor)” against the offeror within the preceding three year period for violations of any number of listed federal or “equivalent state labor laws.” Our fears were exceeded when DoL issued its proposed guidance that defines the above terms in a manner that clearly rob contractors of due process. In our comments on the proposed guidance and FAR proposed rule, we focus extensively on the shortcomings of DoL’s definitions of these key terms. But in summary, it is clear that mere allegations about contractor violations of labor laws could be taken into consideration by the federal government. It is also clear that “violations” that are ultimately the result of government error would also be reportable. For example, DoL will issue a Form WH-56 to a contractor indicating that the contractor has agreed to pay certain “back wages” associated with Service Contract Act (SCA) requirements. Under the DoL proposed guidance, the receipt of a WH-56 form is a reportable “offense,” yet the proposed guidance fails to recognize that the issuance of a WH-56 is often a result of the federal contracting entity failing to put the required SCA clauses into the contract. Such an aggressive approach puts contractors in a position where they are assumed to be guilty of a violation and must take proactive, tedious actions to prove their innocence. To include in the definition findings that are not fully adjudicated raises the risk of situations where an agency prematurely takes actions detrimental to a company (and the government buy-

ers) when the allegation may be reviewed and ultimately dismissed.

The terms “serious, repeated, willful or pervasive nature of any violation,” are also broadly defined in the DoL guidance and would require virtually all allegations or violation, no matter how minor, to be reported.

The Executive Order will Cause Procurement Delays

The federal contracting process is already widely criticized for being overly burdensome and too slow. The E.O. could add significant delays to the federal procurement process pending resolution of even the smallest of infractions that would eventually lead to a contracting officer’s affirmative responsibility determination. Such delays may be further exacerbated by disputes between LCAs and contracting officers about a contractor’s present responsibility. Further questions must also be addressed regarding how such disputes are to be resolved. Delays would also be driven by prime contractors having to delay moving forward with contract performance while they await support and guidance from DoL about the present responsibility of any of their subcontractors. Finally, the increase in procurement award protests because of the E.O. standard will further lengthen the time of the federal contract award process.

The Executive Order Will Result in Less Competition for Federal Contracts and Increased Costs of Doing Business with the Government

In addition to the substantial reporting and related costs associated with complying with the E.O., the E.O. will subject contractors to significant risks. Such risks include increased liability associated with potential false claims or false statements accusations because of inaccurate reporting or certification of compliance under the E.O. Rather than risking such liability and complying with burdensome and costly requirements of the E.O., some companies will simply choose not to do business with the federal government. Ultimately, this only hurts federal agencies by denying them the ability to access companies that may be able to offer the best and most cost-effective solutions. The E.O. will also discourage new entrants from coming into the federal marketplace because of the significant business risks and extraordinary requirements not required in the commercial sector. These effects on the federal marketplace are particularly concerning because they are contrary to this administration’s separate initiatives aimed at reducing regulatory burdens and reducing the cost of doing business with the government in the hope that more commercial companies, and particularly small businesses, will compete for federal contracts.

The effects of this Executive Order must also be considered in conjunction with the other 12 Executive Orders that focus on federal contractors, and in many cases federal contractors’ labor practices. While some of those orders have the support of industry—this one certainly does not—the cumulative cost of implementing and complying with the orders has been significantly down-played by the government.

Conclusion

This Executive Order fails on so many fronts that it can never be effectively implemented in its current form. We believe that more can be done to ensure that intentional violators of the law do not receive federal contracts. But this Executive Order is not the right approach. It should be rescinded and the administration, Congress and industry should work together to find alternative solutions that rely considerably on the existing regulatory and statutory framework. PSC has offered our engagement to key representative of the Executive Branch. It is essential that Congress also be engaged in this process, and that is why we commend and thank you for your attention to this issue and for holding this hearing. PSC looks forward to working with the Congress and the administration on needed improvements.

APPENDIX 1

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
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August 26, 2015

General Services Administration
 Regulatory Secretariat (MVCB)
 ATTN: Ms. Hada Flowers
 1800 F Street, NW
 2nd Floor
 Washington, DC 20405

U.S Department of Labor
 Attn: Ms. Tiffany Jones
 Room S-2312
 200 Constitution Ave., NW
 Washington DC 20210

RE: FAR Case 2014-035, Fair Pay and Safe Workplaces and ZRIN 1290-ZA02, Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces"

Dear Ms. Flowers and Ms. Jones:

On behalf of the Council of Defense and Space Industry Associations (CODSIA)¹, we appreciate the opportunity to submit comments on the FAR proposed rule entitled, "Fair Pay and Safe Workplaces" published at 80 FR 30548 in the *Federal Register* on May 28, 2015 and the Department of Labor proposed guidance published at 80 FR 30574 titled Guidance for Executive Order 13673, "Fair Pay and Safe Workplaces." The rule and guidance seek to implement Executive Order (E.O.) 13673 (as amended by E.O. 13683) by establishing new labor reporting and compliance requirements for determining that a contractor is a responsible source to receive contract awards from the federal government. As both the rule and the guidance are intended to operate in concert, our comments address both simultaneously and are submitted in response to each publication.

Industry supports balanced policy efforts to ensure that only responsible contractors are permitted to receive federal contracts. The E.O.'s recognition, however, that the "vast majority of federal contractors play by the rules,"² raises serious questions about the necessity of creating the sweeping and significant new compliance regime established by this rule.

The government has not assessed adequately the harmful impacts, including the potential for unintended consequences of this rule on the government's mission and the federal marketplace. In this regard, the government has underestimated significantly the costs and the burdens associated with implementing this regulatory scheme.

Industry opposes the proposed rule and proposed guidance. We strongly recommend that this FAR rulemaking be withdrawn for further deliberation by the government in concert with the Department of

¹The Council of Defense and Space Industry Associations (CODSIA) was formed in 1964 by industry associations

² Fact Sheet: Fair Pay and Safe Workplaces Executive Order, available at <http://www.whitehouse.gov/the-press-office/2014/07/31/fact-sheet-fair-pay-and-safe-workplaces-executive-order>.

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Labor (DoL) or, in the alternative, move forward only after (1) communicating and consulting further and more deliberately with industry representatives, (2) revising the rules based on industry recommendations herein, and (3) republishing revised proposed rules for further review and comment.

PROPOSED RULE SUMMARY AND RESPONSE FRAMEWORK

Summarily, the rule is overly broad and arbitrary in its scope, not implementable or scalable under the current regulatory scheme, disrupts the existing labor-management legal and remedial framework, and upsets longstanding and effective acquisition processes, including the responsibility determination and suspension-debarment oversight systems, all without statutory authority or firm expression of need.

The FAR rule requires offerors (prospective prime contractors) seeking federal contracts over \$500,000 to certify to their compliance, and the compliance of any of their subcontractors or suppliers (except for subcontractors providing Commercial-Off-the-Shelf (COTS) items) with 14 named labor laws (and unnamed equivalent state laws) and to self-disclose any violations within the preceding three (3) year period, as defined by the guidance, to the contracting officer (CO). The three-year look-back period begins from the date the offeror submits an offer to the contracting agency.

Further, the rule includes lengthy pre- and post-award obligations and ongoing disclosures by offerors and proposed subcontractors that will impact the supply chain significantly, along with a projected remedial scheme that has yet to be determined and/or tested to the scale required by the rule. The rule also requires the stand-up of a new governmental infrastructure at each agency by designating one or more agency employees as Agency Labor Compliance Advisors (ALCA). The requirement to identify and appoint an ALCA was prescribed for agencies in a memorandum issued by the Office of Management and Budget (OMB) and the Department of Labor (DoL) on March 6, 2015 titled, “Implementation of the President’s Executive Order on Fair Pay and Safe Workplaces,” well in advance of the release of the guidance or the proposed rules or consultation with industry.

Among their proposed duties, the ALCAs will be required to advise the CO and liaise with the DoL to assess any reported contractor violations, and to advise the CO in writing within three days of notice for every transaction whether the offeror is responsible. In this process, they will serve as the agency labor law authority in the analysis, investigation and remediation process between a CO and the offeror, where an offeror or a proposed subcontractor discloses a relevant “violation” on any solicitation submitted to an agency.

Although the ALCAs are responsible for validating prime contractor compliance, they are not involved in the subcontractor compliance review. Under the proposed rule, prime contractors will be permitted, but not required, to seek guidance about a subcontractor’s present responsibility from DoL. Unfortunately, the proposed rule also limits the COs or ALCAs assistance to identifying the appropriate DoL representative assigned to assess subcontractor responsibility, but prohibits further engagement in any substantive way to advise or assist with the subcontractor responsibility determination. They may not advise or assist with the subcontractor responsibility determination process.

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The E.O. thus shifts a significant proportion of the government responsibility to monitor and enforce labor, workplace safety, and anti-discrimination legal compliance across multiple government jurisdictions from relevant government agencies to federal contractors and subcontractors without relinquishing any of the oversight burdens independently applied to federal contractors under federal labor statutes and E.O.s. This oversight burden shift will increase costs and process times dramatically, reduce competition and the incentive for non-traditional and small suppliers to participate in the federal market.

This proposed scheme suffers from multiple fatal errors: (A) the government has failed to perform the required evaluation of the necessity and advisability of this framework before promulgating the rule; (B) this hastily created framework ignores basic issues of functionality, which will ultimately lead to unnecessary costs to both contractors and the federal government; and (C) this framework upends longstanding procurement practices and is silent on a number of critical elements. In light of these flaws, CODSIA proposes a number of revisions and adjustments to the proposed scheme.

Among other things, the CODSIA comments focus on the following issues and make recommendations pursuant to those areas below and throughout this letter:

1. There is no demonstration of need for this new labor compliance regime and no explanation of how it is not duplicative of existing labor law enforcement authorities and functions already resident in the government.
2. The government woefully underestimates the costs associated with compliance.
3. The proposal will have a detrimental effect on government access to goods and services.
4. Analysis of the statutory and regulatory construct: Definitions Proposed in the Guidance and Employed in the rule Are Extra-Legal and Not Found in Statute.
5. The rule creates a “blacklisting” effect for federal contractors and suppliers.
6. The government’s stated preference for Labor Compliance Agreements (LCAs) can be used to unfairly ply unreasonable and unfavorable concessions from contractors and subcontractors in exchange for affirmative responsibility determinations.
7. The proposal is disruptive to the acquisition process.
8. The rule unnecessarily impinges on the discretion of the contracting officer.
9. Key questions about the subcontractor mitigation process must be answered.
10. The complexity of supply chains makes flow-down of these requirements impractical.
11. The rule requires disclosure of sensitive corporate information and does not adequately establish protocols to protect the required information to be collected.
12. The monetary threshold for application of the rule is too low and should be raised.
13. Recommendations from industry to mitigate the impact of the rule and guidance.
14. Other subjects addressed by the rulemaking raise some concerns.

A. The government failed to perform the required evaluation of the necessity, feasibility, and advisability of this new framework prior to promulgation

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1. There has been no demonstration of need for the imposition of a new labor compliance regime for contractors and no explanation how this regime is not duplicative of existing labor law enforcement authorities

Both the FAR proposed rule and the DoL guidance lack any demonstration of need for this new, extra-legal process. At the same time, they disrupt a well-understood process that addresses and the responsibility determination, including determinations involving labor compliance. The existing mechanisms to address labor law violations have existed for decades and provide the government with a broad array of remedial actions. Moreover, this new onerous compliance regime fails to incorporate existing labor law enforcement databases, unnecessarily increasing the burden on both contractors and the government.

a. The Federal Acquisition Regulations (FAR) Part 9.1 establishes adequate authority to address any concerns with labor law compliance in the current responsibility determination process.

FAR 9.104-1 provides the general standards for finding of present responsibility to contract with the federal government. These standards provide guidance to COs to evaluate the responsibility of contractors holistically, considering, amongst other factors: whether they have adequate financial resources; the ability to meet the required delivery or performance schedule; a satisfactory performance record; a satisfactory record of integrity and business ethics; necessary organization, experience, accounting and operational controls; technical skills; the necessary production, construction, and technical equipment and facilities; and, to be otherwise qualified and eligible to receive an award under applicable laws and regulations. FAR Part 9 provides a process for COs to review relevant information in FAPIIS and other government systems, as well as information provided by contractors in response to contractually required representations and certifications. Through this multi-layered process, the CO is able to incorporate multiple sources of information regarding a contractor's responsibility.

The emphasis is on establishing the contractor's present responsibility through a series of information gathering and validation steps now replete with contracting prohibitions based on various types of alleged individual and company behavior. Over the course of 36 months, a contractor may have had a violation and executed a remediation. Moreover, if a contractor is found to be in persistent violation of labor laws, independent authority exists for them to be suspended or debarred until such time as the contractor remedies its violation, sufficient to be found presently responsible. Neither the Executive Order nor the guidance and proposed rule address why these mechanisms are not working or are ineffective in their operation.

b. The new framework proposed by the rule fails to capitalize on existing government databases tracking labor law violations.

In addition to ignoring the existing suspension and debarment framework, the proposed rule will lead contractors, even commercial/COTS item providers, to report into federal databases violations already tracked by DoL and the other relevant agencies. OSHA, for instance, maintains databases for

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approximately 100,000 OSHA inspections conducted annually and displays enforcement data on their website. The dataset includes the reason for an inspection, citation details, penalty assessments, and accident information associated with OSHA standards violations. Data aggregations such as this map and applications demonstrate that DoL has the ability to and in fact already has aggregated existing compliance data. Likewise, GSA maintains the SAM database which already contains much of the information the proposal seeks to collect from contractors and their subcontractors regarding their past performance on government contracts.

The OSH Act itself, at Section 8(d), requires that “any information obtained by the Secretary...be obtained with a minimum burden upon employers...unnecessary duplication of efforts in obtaining information shall be reduced...” (29 U.S.C. § 657(d)). In light of this requirement, and the fact that DoL has provided no explanation why it cannot aggregate and utilize the information it possesses, we believe that the DOL should aggregate the data it already receives into a single database and abandon the proposed duplicative information collection and reporting scheme, or in the alternative, fund its own data collection efforts and allow industry to input data into that portal.

Despite the existence of these databases, containing a wealth of data regarding reported labor law violations, the rule proposes to create a new database from scratch based entirely on contractor self-reporting. Disregarding the E.O.’s mandate to increase efficiency and cost savings in federal contracting, the DoL has failed to explain why consolidating and aggregating labor compliance information is less feasible and less burdensome and costly than creating from scratch the information collection and data reporting construct this rule imposes. To reduce the reporting burden on contractors and subcontractors all data currently available in existing government data bases should be utilized by the contracting officer and Agency Labor Compliance Advisors, and should not be required to be provided under this Regulation.

c. The government woefully underestimates the costs associated with compliance.

As outlined below, the E.O. shifts a significant proportion of the burden of monitoring and enforcing labor, workplace safety, and anti-discrimination legal compliance in multiple government jurisdictions from appropriate agencies to federal contractors and subcontractors without relinquishing any of the existing oversight burdens applied to federal contractors under the respective federal labor statutes and E.O.s.

There is a great deal of concern about the cost and burden associated with this proposed rule and the fact that the government has woefully underestimated these costs and burdens. The costs of shifting this labor compliance burden will be astronomical. Some federal contractors have large supply chains with a commensurate number of subcontracting agreements numbering in the tens of thousands. A six month review cycle as contemplated in the E.O., of thousands of subcontractors, even with the minimal due process requirements it includes, is not scalable to the process currently envisioned and thus not executable on a timely basis, even if only a small number of subcontractors report violations of the E.O.’s covered labor laws.

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Hypothetically, if one-third of a large company’s supply chain (say 5,000 suppliers or subcontractors) has any reportable “violation” that could be cause for the prime contractor to review thousands of cases and potentially trigger similar reviews and engagement with the yet-to-be-created ALCAs or DoL. Not only do companies not have the compliance and manpower resources to conduct these type of enforcement reviews, or the legal expertise at all levels of the subcontract transactional process to distinguish an alleged violation from a civil judgment or an administrative merits determination, especially where such legal decisions are not final, the DoL would also be overwhelmed by responsibility reviews of even minor cases that would ultimately need clearance.

The President’s FY 2016 budget request included funding for an Office of Labor Compliance within DoL that would be staffed by 15 federal employees at a cost of \$2.6 million. If this office is intended to be the resource for prime contractors to consult with regarding subcontractor responsibility determinations, then CODSIA would express strong concerns that the full time employee count of 15 falls far short of the number of personnel that will be needed to support prime contractors. It is worth noting that the FY 2016 Labor/HHS appropriations bill, as passed by the House appropriations committee, would prohibit the use of fiscal year 2016 funds to establish an Office of Labor Compliance. If this provision is enacted into law, there is little question that the supporting DoL/LCA infrastructure will not be in place or actively engaged in their advisory role as the implementation proposes and be resource starved at the outset.

The table below sets forth the various labor laws and the responsible federal administrative agency for purposes of directing attention to the scale and scope of the process being implemented. If nothing else, the table reflects how many discrete agencies and structures within the DoL and elsewhere in government that an ALCA, a CO, and all prospective federal contractors and subcontractors may have to engage with before a single responsibility determination can be made and a contract can be awarded or any single subcontract can be approved.

List of Laws and Administrative Responsibility

Law	Administrative Enforcement Agency
<u>Fair Labor Standards Act</u>	Department of Labor (DoL) – Wage & Hour Division
<u>Occupational Safety and Health Act</u>	Department of Labor (DoL) – Occupational Safety and Health Administration
<u>Migrant and Seasonal Agricultural Worker Protection Act</u>	Department of Labor (DoL) – Wage and Hour Division
<u>National Labor Relations Act</u>	National Labor Relations Board (NLRB)
<u>Wage Rate Requirements</u>	Department of Labor (DoL) – Wage and Hour Division
<u>Service Contract Labor Standards (Service Contract Act)</u>	Department of Labor (DoL) – Wage and Hour Division
<u>Executive Order 11246 – Equal Opportunity</u>	Office of Federal Contract Compliance Programs (OFCCP), DoL
<u>Section 503, Rehabilitation Act of 1973</u>	Office of Federal Contract Compliance Programs (OFCCP), DoL
<u>Vietnam Era Veterans Readjustment Assistance Act</u>	Office of Federal Contract Compliance Programs (OFCCP), DoL

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Family and Medical Leave Act	Department of Labor (DoL) – Wage and Hour Division
Title 7 – Civil Rights Act of 1964	Equal Employment Opportunity Commission (EEOC)
Americans with Disabilities Act	Equal Employment Opportunity Commission (EEOC)
Age Discrimination in Employment Act of 1967	Equal Employment Opportunity Commission (EEOC)
Executive Order 13658 – Minimum Wage	Department of Labor (DoL) – Wage and Hour Division

**Equivalent State Laws (Undefined except OSHA approved state plans)*

- i. Assessing the burden of this proposal is incomplete pending several clarifying actions DoL or the FAR Council must provide.

Additional considerations are necessary to fully define the burden associated with this rule:

- A. *The cost of complying with unspecified “equivalent” state laws cannot be determined.*

To date, the state laws “equivalent” to the fourteen specified federal laws implicated by this framework have not been defined by the government. Accordingly, industry has been unable to quantify the precise cost of identifying, reviewing, and reporting “violations” under the rule. However, based on the reality that each state has its own, idiosyncratic set of labor statutes and regulations, it is reasonable to conclude this will be a substantial undertaking. Simply identifying, understanding and staying current on the applicable laws in each state in order to understand which “violations” would be covered by the rule could be a momentous legal undertaking and maintenance effort. Many large contractors operate in all fifty states but, even contractors which do not operate in all fifty states would still be required to have knowledge of the statutes and regulations in states other than which they operate, to the extent a violation is reported by a subcontractor under that states’ regime. Creating the mechanism and devoting the resources necessary to capture and report state level “violations” in up to fifty different jurisdictions will certainly require significant financial resources. None of the options discussed in this proposal for how to collect information from the supply chain would help alleviate a prime or subcontractor of this cost and burden. Industry has estimated that there would be hundreds of equivalent state laws captured by this proposal. It is unclear how the DoL will undertake and sustain a capability to catalogue and maintain currency on these state statutes, because no such capability or resources devoted to such a capability are in place today. The fact that the DoL guidance and this rule have postponed this element of the rulemaking is ample evidence of the complexity of this undertaking.

- B. *Agencies can anticipate significant delays acquiring the goods and services they need for mission requirements.*

To the extent that all federal contracts are issued to meet essential missions for a public purpose, including the defense of the United States from military attack and terrorism, the management and preservation of our natural environment, protection against cyber terrorism and cyber-attacks, control of the nuclear stockpile, control of the energy grid, regulation of the nation’s airspace, conduct of international trade and diplomatic relations, piloting spacecraft to outer space, to name but a few, it is

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difficult to underestimate the damage to the nation’s interests from the lengthier and more complex, litigious and exclusionary award process that is likely to result from this rulemaking.

The rule contemplates a perfectly harmonious labor-management environment that is inconsistent with a modern industrial world and the modern regulatory and governance model. In that light, contracting outcomes will become less predictable, since it is likely that a negative labor law responsibility determination for either prime or subcontractor will become a regulatory bottleneck at the last moment before an award. This bottleneck will conceivably lead to the overthrow of many projected awards and oust many otherwise eligible prospective awardees from consideration and/or cause the renegotiation of new or different subcontract or supplier agreements to account for the need to change vendors, all of which will create added risk of bid protest. While the rules contain a notional date of 3 days for the ALCA to respond to the CO request for assistance, that estimate is contingent on the actions of other parties and submission of a significant amount of data. This three-day response requirement does not appear to be binding on the ALCA and is likely to be ignored in the pace of events. Industry also notes that there has also been no specific timeframe identified for resolution of the process where a prospective contractor consults with the DoL on subcontractor labor law related non-responsibility determinations. Such an oversight must be addressed to establish and maintain some regularity to the process.

The procurement and labor law due diligence process will thus take much longer to complete and the cost to engage in the federal marketplace, already unduly high, will grow disproportionately higher for prospective contractors trying to retain performance teams in place while dealing with the labor law due diligence process, including the likelihood that companies will have to stand up large and expert compliance functions solely for this purpose. Under the normal process of crafting a profitable proposal and considering continued cost pressure downward by government buyers on companies engaging in the federal market, it is likely that already low company investment returns will be negatively impacted, leading to less competition. Even with competition, the FAR Council should expect that awards for contracts over \$500,000 will have lead-times of many more weeks, if not months (not including bid protest impacts), simply to clear the responsibility determination hurdle. As stated above, such action was once considered the last step before an award is announced and previously done within a day or two prior to, or contemporaneous with, an award.

It is likely that the responsibility determination process, already expanded by many other new pre-award compliance checks aimed at catching bad actors in the federal government space (such as tax delinquents, human traffickers, counterfeit part and payroll fraudsters and offshore contractors), will become its own distinct, segregable procurement process, aimed at enforcing laws not necessarily related to contract performance, rather than a last due diligence step on present responsibility as prescribed in FAR Part 9.

Such administrative delays in procurements were one of the primary reasons that the seminal acquisition reform statutes were passed two decades ago. Eviscerating the efficiency measures put in place by those status, this rule will bring back extraordinarily long lead-times for even non-complex commercial items, and where highly competitive and/or complex, technology based supplies or services are necessary to meet the agency missions, the procurement lead-times could easily double or triple in

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length, meaning a procurement scheduled now to take 9 months could take 2-3 years to execute while any or all violations are disposed of or closed out. Agencies should anticipate that missions will be enormously and negatively impacted by the insertion of these rules into the procurement process.

CODSIA reiterates that the government has poorly addressed or anticipated these impacts in the development of this rule and urge again that it be withdrawn until such time as the ramifications of this action can be effectively catalogued and mitigated or eliminated.

C. Delays resulting from the inability to address the volume of transactions are inevitable.

The proposed rule requires that the ALCAs will respond within three days in writing to any request from a CO for advice on a responsibility determination regarding the award of a contract. The federal government contracts each year for billions of dollars of goods and services across hundreds of thousands of contracting actions. While the proposal limits application of this framework to contracts over \$500,000, or subcontracts over \$500,000 for non-COTS items, this does not sufficiently narrow the scope of application to make the resulting process manageable given the currently level of dedication of resources. The Department of Defense (DoD) alone has over 24,000 COs – far too many for a departmental ALCA to effectively address. Since the related actions by this administration do not provide additional resources to create legions of ALCAs to match the legions of COs, delays are inevitable.

Furthermore, just because a contractor avoids reporting on one contract because it is below the \$500,000 threshold does not negate their compliance requirement if they plan to ever grow or be more successful in their business. For primes, there are no efficiencies to be found in flowing these requirements through the supply chain in a piecemeal or spotty fashion. Should a prime contractor omit this requirement in an initial subcontract because the dollar value did not meet the \$500,000 threshold, it could find itself in the position of having to renegotiate that subcontract and perform an evaluation of the subcontractor's labor law compliance mid-stream should it later require additional orders from that supplier under the prime contract which raised the total value over the threshold amount. Government and industry should anticipate instead that, both out of an abundance of caution and risk management, and in the interest of efficiency these compliance requirements will mostly flow to all companies in the supply chain. Given that the federal government has incomplete data regarding the number of companies actually serving the federal industrial base as subcontractors and suppliers below the first few tiers, we must rely upon the accurate tallies offered by large primes. It is therefore reasonable to conclude that hundreds of thousands of subcontractors and suppliers exist across the federal enterprise. If the rules are to be applied across a corporate enterprise for purposes of compliance, record collection and reporting, then that number could easily exceed a million vendors across the global market. Capturing data on a million vendors every six months and ensuring that it is reported to the DoI and effectively catalogued for use by the ALCAs is a task the government is ill equipped or resourced to manage. Such a volume would also dramatically increase the compliance costs for prime contractors, which will be passed along to the taxpayer in the form of higher prices.

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Industry believes that the monumental regulatory compliance apparatus necessary to capture and manage the volume of data that would be collected would be unwieldy, at best, and it is difficult to imagine that it could be efficient enough to support the ALCA advising the CO in the time prescribed under the proposed rules. Such delays would be significantly compounded given the scant number of ALCAs available to review the volume of contracting actions.

This means that the government and industry must anticipate delays in government contracting if this proposal is implemented and some of those delays could be extreme. Delays can be unavoidable because of bureaucratic processes, but delays associated with the limited resourcing in anticipation of this rule are unacceptable. In government contracting, delays are frequently impermissible because of mission urgency, like national or cyber security, or when lives could be at stake, like provisioning the warfighter or responding to natural disasters. In order to address this situation, the government should establish contingency protocols providing COs with the ability to proceed with contract award when delays are impermissible. Such options should be established before this rulemaking becomes final. Additionally, the government should realistically assess the volume of regulatory activity this rule creates and effectively resource to mitigate the inevitable delays this rule will bring.

D. Industry anticipates the volume of bid protests will increase.

In addition to the delays that this framework will introduce into the normal procurement process, the other inevitable outcome of implementing these new requirements would be to provide a new and easy protest ground for unsuccessful offerors. Wherever an awardee has at least one reportable “violation” under the rule, an unsuccessful offeror could raise as a challenge to the procurement decision the agency’s failure to properly consider the responsibility of that awardee in light of this “violation”. Although the record of the ALCA and CO’s consideration of the matter would, in many instances, lead to the denial of this protest ground, this resolution could not be accomplished without completion of the full protest adjudication process—100 days at GAO and potentially longer if brought at the Court of Federal Claims. Troublingly, in a procurement where a protestor might not have any other valid basis for protest, a single “violation” could provide a basis to force full protest adjudication, delaying the procurement and adding substantial cost to the government.

The inevitability of this new protest ground derives from the fact that, as currently envisioned, information regarding any reported “violation” will be made available in FAPIIS. *80 Fed. Reg. 30,549*. Thus, even if a competitor would otherwise have no basis to challenge an award, publicly available information will provide them with a road map to protest.

Even if the information made publicly available in FAPIIS is limited to address this concern, the rule fails to account for the reality that, considering the requirement to review subcontractor information, companies will still be put in the position of revealing detailed information regarding their labor law compliance to other parties, including potential competitors. Parties will be required to negotiate complex Non-Disclosure Agreements (NDAs) to simply exchange information related to any labor law violation as contemplated under the clause at 52.222-BB(c). Nonetheless, it is reasonable to conclude that revealing such sensitive information to a competitor or other third party, even those operating

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under an NDA, could create added fodder for future bid protests and additional litigation between the parties.

Industry further anticipates that the current staffing at GAO is insufficient to manage the expected increase in the number of protests as a result of adverse or delayed responsibility determinations under this rule. Such an increase would become unmanageable and companies entering into a protest would experience additional delays, on top of those already contemplated above, in the contracting process. Since a bid protest at the GAO automatically stays performance of a contract, these actions (even without considering resource shortcomings) would create further delays in federal contracting.

E. The reporting requirements are overly burdensome.

The reporting requirements in the operative clause require semi-annual reporting by primes and subcontractors of disclosed violations over the life of the contract – essentially creating a kind of continuing responsibility determination process - the purpose of which is unclear since it applies to the ongoing DoL duty to monitor labor law violations. The cost estimates for these ongoing reporting requirements are enormous and disruptive to industry business objectives. Considering the number of contracts that may be subject to the rules, and that each contract will have a different award date, contractors may be reporting multiple times on each contract on the same violations over the term. Reporting should be consolidated as annual or semi-annual based on a date the contractor selects and that could align to the maximum extent with other report submissions to the federal government for other purposes, such as when DoD CAS-covered contractors have to submit their incurred cost submissions at the same time each year. This could help industry build predictability in the supply chain and prevent industry from flooding the government with redundant reports on the same violations.

F. The government has grossly underestimated the cost to industry of implementing new compliance tools.

In the proposed rulemaking, the government fails to accurately recognize the substantial costs that federal contractors and subcontractors will incur to implement the brand new compliance processes and systems to identify, analyze, and track reportable “violations.” Currently, there is no comparable requirement to track “violations” of federal and state labor laws in the manner required under this proposed framework. Accordingly, the vast majority of industry will be required to design and implement—from scratch—processes and systems to both collect this information and to then review it to determine whether it is a reportable “violation” under the rule. The cost associated with implementation and maintenance of these new systems, including the administrative and legal personnel required to process and review the data generated, will be substantial and will be ultimately passed on to the taxpayer through higher overhead rates and/or higher prices for goods and services.

Additional costs will include the need for new tools at companies in order to establish and maintain compliance and reporting requirements. Some companies use cross-functional databases accessed by various departments including Security, Ethics, Legal, and Human Resources/Equal Opportunity (Program EOP) to track internal usage and control access. Functionality can be limited or privileged and no such functionality as contemplated by this proposal is currently part of any database that can be

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identified in industry. Costs to develop a tool to collect data in one place within a company, and analyze and track all “violations” would likely be required because current tools were not designed to track and report on matters as currently defined in the Executive Order, the guidance and the proposed rule. For some tools, the annual operating cost in one business unit facing the federal government is \$500,000. Companies have not yet been able to confirm the design and development costs for upgrades as described above, however, it likely exceeds the annual operating costs and will be a multi-year project. Anecdotally, standing up industry compliance with the E-Verify system across one large federal contractor simply to verify an employee’s identity cost between \$1,000,000-2,000,000, not including any recurring expense to operate and maintain.

Reportable matters from a wage hour perspective will require establishment of a process to track and report. For most companies, DoL wage and hour investigations are today handled and resolved at the business area level and are not tracked centrally. For some companies, Service Contract Act and Davis-Bacon Act matters are tracked centrally but are handled and resolved in the business area.

Lastly, many companies believe that, as the items included in the proposed regulation’s reporting requirements extend across functional areas, a cross functional tool may need to be built to support each area separately, capturing relevant information in a tool while ensuring that the data is only available to those deemed necessary to the reporting aspect.

Therefore, companies looked at current tools utilized by various departments within their organizations including Ethics, Legal, EOP, Security, etc., to track relevant information related to investigations, to get an estimate regarding building a compliance tool. Using similar existing tools, industry is able to evaluate additional burdens associated with managing risks associated with this rule and the resultant compliance and reporting regimes required by this rule and the DoL guidance. A representation of that burden estimate is presented below.

Activity/Event	Description	Time Estimate
Confirm if contractor has any reportable offenses for each Contract of \$500,000 and above to be bid	Company would determine best method to confirm with Business Area & then collect data	8 hours per reportable offense
Business Area confirm status	Business Area confirms if they have reportable offense within prior 3 years and report back to Corporate Equal Opportunity	8 hours per Business Area per reportable offense

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	Program	
Enter reportable offense into DOL System for Award Management (SAM) database		½ hour per offense circumstances
Type of Violations as determined by Agency Labor Contract Advisor (ALCA)	N/A	N/A
Determine the likely level(s) of violation assigned to each reported offense		40 hours per reportable offense
Corporate confirm monthly status of any reportable offense	Ongoing maintenance of database	4 hours per month
Business Area confirms monthly status of any reportable offense	Business Area confirms any new or changes if they have reportable offense and report back to Corporate	4 hours per Business Area per month
<p>Determine which reportable offense which has already or is being reported belong to which contract</p> <p>It is assumed that once a contract is awarded there is not a retroacted review of previous rewarded contracts.</p>	<p>Corporate Equal Opportunity Program would need to review reportable offenses and identify to which Business Area they belong.</p> <p>Contractors would need to notify or get verification from Corporate Equal Opportunity Programs and other POCs if the Business Area(s) in the new or</p>	2 hours per reported offense

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	revised contract has any reported offenses listed in SAM or are likely to be listed prior to the award of the contract.	
Remediation/Clarification Discussion with ALCA in Agency	If Agency ALCA requests more information about a violation, discussion will be needed to offer mitigation defense, or clarify on questions	40 hours per offense cited
Review Subcontractor reports on Equal Employment Opportunity/Affirmative Action offenses	Internal or external; prime reports to SAM or option to have Subcontractors report directly to DoL/SAM and provide prime with case numbers	20 hours per contract
Database Use/Maintenance		\$500K Annual
Corporate total hours per "Reportable Offense"		90.5 hours
Business Area total hours per "Reportable Offense"		8 hours
Corporate total hours per month "Maintenance"		4 hours
Business Area total hours per "Maintenance"		4 hours

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Combined Corporate & Business Area "Verification of Subcontractor compliance per contract"	20 hours
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Such costs spread across the entire industrial base and the entire supply chain for the federal government are not adequately reflected in the cost estimates the government has provided as part of the proposal documentation. The following economic impact assessment developed by industry outlines what we believe will be a realistic cost and burden to industry and government.

Considering the scale and cost to address the practical problems that will be encountered in the data collection, fact finding and reporting functions, and absent the withdrawal of the proposed rules, industry recommends that the government create a government-wide labor data collection and reporting repository to be stood up over time to be updated annually or biannually that contractors can use to submit ongoing compliance data, violation records and any other relevant information that government COs can then use to make their labor law responsibility determinations. Any system for the collection and storage of such data must have the requisite protections needed to prevent leakage of proprietary data or privacy protected data to the public or to potential competitors.

2. The proposal will have a detrimental effect on government access to goods and services.

a. The rule will have a detrimental impact on non-traditional contractors and small businesses.

This year, Under Secretary of Defense for Acquisition, Technology, and Logistics, Mr. Frank Kendall, the Chairman of the House Armed Services Committee, Rep. Mac Thornberry, and the Chairman of the Senate Armed Services Committee, Sen. John McCain, have all announced initiatives to increase the technological competitiveness of U.S. military equipment. All three have seen and expressed concerns about the advances that other nation-states have made relative to U.S. technology, and the impact that those gains will have in emboldening nations to misbehave globally. Already the United States has seen irresponsible behavior by Russia in Crimea and Ukraine, and efforts by China to build land barriers in the South China Sea in order to exert new, disruptive territorial claims well outside of its traditional borders. These behaviors will only become more aggressive as foreign states approach technological parity with the U.S. military.

One of the solutions to this challenge is for the U.S. defense industry to gain increased access to the global, commercial, and financially complex technology innovators outside of the industry that traditionally does business with the government. These “non-traditional” suppliers often avoid doing business with the government due to the increased cost, and regulatory and compliance requirements that companies face when dealing with government customers. That outcome means a loss of needed technology in some cases, and more expensive technology in other cases.

One response by industry to the increase in regulatory pressure by the federal government in the form of unique requirements is to create distinct and separate corporate business units to sell to the

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government designed solely for the purpose of meeting those unique compliance requirements. Such changes in business models carry with them all the added costs associated with the unique regulatory requirements, such as those proposed here, but are also mostly disruptive to commercial suppliers, increase costs to the government, and defeat the government’s declared intention to capitalize on current technology innovators within the commercial market. Another means by which new technologies have entered the federal marketplace is through acquisition by a prime contractor from a supplier or subcontractor. The procurement of such technology, however, through these commercial vendors will be hampered if they are required to accept, as a contractual flow-down, the requirements to report and be subject to assessment by a prime of labor law compliance under this onerous framework. These primarily commercial suppliers will not have the compliance processes to track and report the required information, and may be unable or unwilling to make the certification required by the FAR flow-down.

Combining the labor law compliance and enforcement processes with the contracting process provides an example *par excellence* of the phenomenon that will drive away non-traditional, innovative suppliers. If the U.S. commercial marketplace has one set of labor compliance rules which are less burdensome than the rules that apply to the government marketplace, commercial suppliers will choose to remain exactly that—they will decline the exposure and heightened risk involved in selling to the government or to prime federal contractors. The probability of this decision will increase because the rule and guidance will require enormous compliance investment and has the potential to create more labor disruption in a commercial supplier than it purports to cure, while offering only the incentive of receiving a single, time-bounded government contract as the reward for compliant behavior.

Particularly at a time when sequestration is reducing the available spend on federal contracting, increasing competition cost and lowering the likelihood of success, the government should seek to make itself a more attractive buyer, not a less attractive one. The proposed “Fair Pay, Safe Workplaces” rule does the opposite. Faced with this substantial compliance hurdle as an entrance fee to seeking government work, not to mention the multitude of other regulatory compliance requirements facing the government vendor, companies not currently participating in the federal marketplace will have no incentive to pursue such work.

Furthermore, this Administration has made a concerted effort over the last few years to attract non-traditional companies, particularly for information technology needs in the federal market. They have dispatched representatives to Silicon Valley to specifically recruit new talents to public service, created the “18F” incubation program and the U.S. Digital Services to bring that talent to bear in the federal agency structure. They have also offered capabilities using non-traditional contracting exercises, like the Buyers Club and the recent GSA solicitation for assistance to 18F, as a means to attract small, non-traditional technology vendors to the market. Such efforts are detrimentally impacted by this proposal. The flow-down provisions also prevent more traditional federal market prime contractors from securing innovative goods and services from these non-traditional actors, who are not adequately resourced to effectively comply with these requirements and/or do not wish to reveal or publicize their alleged or actual labor law violations. Accordingly, the risk associated with an adverse decision by the DoL regarding their compliance as a supplier or subcontractor could lead to an existential crisis for small companies that cannot be mitigated through any process. This rule directly undermines and negates

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these efforts and establishes a requirement that makes their success significantly more challenging. The Administration needs to reassess these impacts upon these other priorities they have established and consider establishing options to mitigate these detrimental effects.

b. The government should consider the impact of this rule to small businesses.

The challenges presented by this rule when applied to “non-traditional” suppliers only increase when applied to small businesses. While the government by law prefers small business suppliers, these suppliers are the least able to efficiently metabolize significant new compliance burdens. In theory, large companies can spread new compliance costs across a significant number of contracts executed across the enterprise. Small companies instead see their overhead rates increase dramatically, on an exponential scale, with each additional new compliance burden. The more compliance burdens levied on small businesses, the more difficult it is for them to compete in the federal marketplace, regardless of the other advantages we may provide to them. Considering these businesses are already required to comply with the underlying federal and state statutes, the imposition of this additional compliance burden will have the effect of hampering their ability to operate as lean, low-overhead, and agile operations.

CODSIA also notes that there is some confusion over the application of the rule to small businesses. Under current procurement rules, the simplified acquisition threshold, under which all acquisitions are reserved for small businesses, is \$150,000. Over \$58 billion of the total \$101 billion small business set-asides are greater than the simplified acquisition threshold in FY 2014. That is over 57 percent of the small business set-asides that are potentially greater than the current \$500,000 limit. With services NAICS codes starting at \$1 million annual gross profit, and construction-related services like architecture (\$7.5 million), engineering (\$15 million) and construction at (\$36.5 million) there are many opportunities for small businesses to be negatively affected by this rule, as either a prime or a subcontractor. The rule will affect small, medium, and large businesses, which is antithetical to the current Administration’s policy for including new small businesses in the government. Although the brunt of the rule will not fall on small businesses, but on mid-tier and large contractors, small business will still be subject to the rule if they enter into a prime or subcontract over \$500,000. While it is presumed that setting the threshold at that level was designed to exempt many small businesses performing only at lower thresholds from being impacted by the rules, it may not accomplish that objective, given the rule’s application to subcontractors. There is also some concern that if the rules are tailored to mostly exempt small businesses, higher tiered contractors will have to absorb all risk related to labor law violations by small business suppliers.

3. The economic analysis supporting the order is severely deficient.

Executive Order 12866 directs agencies “to assess all costs and benefits of available regulatory alternatives” and to “select those approaches that maximize net benefits.” It also directs each agency to base “decisions on the best reasonably obtainable scientific, technical, economic and other information,” and to “tailor its regulations to impose the least burden.” Executive Order 13563, further directs agencies “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” In the truncated time provided to develop and publish the

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proposed rule and guidance, the FAR Council and the DoL have not complied with these requirements. Instead of presenting a reasoned analysis based on verifiable empirical evidence of the benefits and costs of the selected regulatory approach and of the alternatives considered, the FAR Council and the DoL have presented an incomplete analysis based largely on assertions and assumptions not supported by empirical evidence. For example, the cost-benefit analysis:

- Incorrectly assumes that firms already track and maintain consolidated records of alleged labor law violations covered by the E.O. In fact, the proposed rule will compel current contractors and subcontractors, *and prospective contractors*, to create information systems that do not currently exist to collect and track the ongoing status of all enforcement and legal actions companies may have related to the covered federal labor and employment laws and executive orders and the as yet undefined equivalent state laws. Importantly, these costs are inherent when a company indicates they have no violations to report.
- Fails to estimate the costs associated with the labor compliance agreement process. These costs would include the legal costs of entering into such agreements with a wide variety of enforcement agencies. Moreover, it is possible that some contractors and subcontractors will be required to enter into three separate labor compliance agreements with the DoL, the EEOC, and the NLRB that have separate jurisdictions over the federal laws they enforce.
- Because of these significant additional costs and the failure by the government to include them in the published economic analysis, especially those costs associated with the labor compliance agreement process, is hard to assign to mere oversight. In any event, such oversight is clearly a violation of the Administrative Procedures Act and the Office of Federal Procurement Policy Act, and as such, the FAR Council and DoL should re-propose the rule and guidance to include a discussion of this critical component of the E.O.

B. This hastily created framework ignores basic issues of functionality, which will ultimately lead to unnecessary costs to both contractors and the federal government

- 1. Analysis of statutory and regulatory framework: The definitions and policies proposed in the DoL Guidance and in the FAR rule are problematic, extra-legal, violate fundamental due process requirements and remedial frameworks in existence and should be withdrawn or radically revised before implementation.**

The definitions proposed in the guidance and used in this rule are overly broad and vague, and thus unfairly limit the rights employers have under law. The definitions alone significantly expand the scope of application of this proposal and create challenges for any company wishing to engage in the public sector market as a prime or sub-contractor.

The DoL guidance creates significant confusion by introducing alternate and duplicate, parallel remedies that appear to conflate mere complaints, letters, and allegations regarding labor law infractions with fully adjudicated legal decisions. The proposed FAR rules reliance upon the DoL guidance to define new enforcement application of those definitions essentially eviscerates statutory due process for labor law compliance for contractors, subcontractors and suppliers.

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The potential for adverse action in federal contracting against a contractor, subcontractor or supplier attributable to a non-responsibility determination or an ongoing set of adverse determinations for such a wide range of alleged or putative violations is self-evident to industry and far more draconian than those currently imposed by the governing labor statutes or E.O.s. As indicated below, resolution of many labor litigation cases often takes years before final resolution and a broad expansion of the responsibility determination process to subsume such litigation into its ambit will unduly and unnecessarily lengthen the procurement cycle. Such a lengthening of the process is beyond the exercise of any efficient contracting process and will result in unconscionable delays in source selections to fulfill agency missions.

Additionally, as will be seen in the detailed discussion of significant cases below, and repeated at other junctures herein, the responsibility determination process, prior to this rulemaking, has been designed as a final brief check on a contractor’s business capabilities and integrity prior to award. It is specifically not intended as an *adjudication* of a prospective contractor’s alleged bad acts, inclusive of labor law violations, in the many areas identified in FAR 9.1. Thus, implementation of this framework using the terms set forth in the guidance is not only flawed on its face and unfair to all parties given the existing contract and labor law frameworks, but will lead to excessive and unwarranted delays in the procurement process.

a. Agency preliminary assessments are not and cannot be labeled violations of law.

The expansive proposed definition of “administrative merits determination” (“AMD”) circumvents statutory mandates and fails to accomplish the increased efficiency or costs savings that the executive order demands. At its core, the proposed guidance and implementing rule transform agency preliminary assessments and ongoing disputes with employers into “violations,” never contemplated by the statutes or implementing regulations. Any AMD short of a final and enforceable order of the agency would impose a punishment on contractors that Congress has not included in the underlying statutory language, and therefore cannot stand. Further, the guidance seeks to create a distinction between complaints filed by individuals and initial findings by agencies. In practice, this is a distinction without difference, as the underlying statutes afford no such latitude in their adjudicative mechanisms. The guidance and the corresponding rule will use initial findings and assessments as if they were “violations,” foreclosing due process as established in the governing statutes for the accused party.

- i. The referenced laws have specific statutory and regulatory adjudicatory mechanisms that cannot be short-circuited by executive order or agency guidance.

Each of the fourteen statutes listed in the E.O., and the unspecified equivalent state laws, already have in existence their own enforcement and adjudicatory mechanisms. The use of initial assessments as violations and the subsequent incorporation of an unrelated review of these purported violations of these statutes through the evaluation of a contractor’s responsibility, where there is not necessarily an accompanying finding of violation through the dedicated channels for enforcing the underlying requirement, inappropriately shortcuts the underlying statutory framework. The three statutes discussed in detail illustrate the inappropriate distortion of existing processes effectuated by the rule’s

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definition of AMD. The examples below provide three types of statutes as examples, but each of the listed statutes in the executive order has its own adjudicatory mechanism, which cannot and should not be distorted or cut short through executive order. Unfortunately, the proposed AMD definition would do just that. The definition must be recast to fit within the requirements of the underlying statutes and employ only violations as fully adjudicated under each statutory framework.

In the context of the Occupational Safety and Health Act (OSH Act), the DOL, through the Occupational Safety and Health Administration (OSHA), has the authority to inspect workplaces to identify if it believes employers have violated any standards promulgated under the OSH Act or violated a general duty to provide a place of employment which is free from recognized hazards. 29 U.S.C. § 657(a). OSHA may issue citations to the employer for violations of these standards or the general duty clause. 29 U.S.C. § 658(a). The employer and the applicable OSHA area office may reach an “informal settlement agreement” within 15 working days of issuance of the citation. 29 C.F.R. § 1903.20. The employer has 15 working days to file a “notice of protest” over issuance of the citations. 29 U.S.C. § 659(a). After the employer has filed a notice of contest, the Area Director may enter into a Formal Settlement Agreement with the employer. *OSHA Field Inspection Reference Manual*, § IV.D.4.d. OSHA, through the Solicitor of Labor, must file a complaint with the Occupational Safety and Health Review Commission (OSHRC) no later than 20 days after receipt of the notice of contest. 29 C.F.R. § 2200.35. The complaint is first heard by an Administrative Law Judge (ALJ) who makes findings and issues an order on the complaint. 29 C.F.R. § 2200.90. The employer may appeal the finding/order of the ALJ to the full OSHRC. 29 C.F.R. § 2200.91(b). The parties may enter into a settlement at any stage of these proceedings. 29 C.F.R. § 2200.100(a). The employer can appeal an adverse decision and order from the OSHRC in the appropriate United States Court of Appeals. 29 U.S.C. § 660(a).

The proposed rule and guidance, which would require reporting of OSHA “violations” at the initial citation stage, regardless of any notice of protest or ongoing settlement. Accordingly, the ALCA and CO would evaluate, and potentially base a finding of non-responsibility, on a preliminary complaint, regardless of any notice or protest. This undermines the very framework established by the OSH Act, which specifically provides for a process to challenge findings of violations, and punishes the employer in the absence of any actual finding of liability. In other words, the proposed rule and guidance labels a preliminary assessment or ongoing dispute as employer liability for a violation – which it is not. If a citation is withdrawn or settled informally (or settled at all in the absence of a specific admission of liability), it is not and should not fall within the AMD definition and should not be deemed a “violation”. If the employer pursues its rights to contest a violation, then during the pendency of that proceeding, the citation should not fall within the AMD definition and should not be deemed a “violation”.

A similar result occurs in the context of the National Labor Relations Act (NLRA). Under the NLRA, a union or employee files a charge with the National Labor Relations Board (NLRB) alleging that an employer committed an unfair labor practice. 29 C.F.R. § 101.2. After an investigation, the NLRB decides whether to dismiss the charge or to file a complaint. 29 C.F.R. § 101.6. The NLRB, through the Office of the General Counsel, has the authority to issue a complaint against any person based on an assessment that the employer committed an unfair labor practice. The General Counsel will file the complaint to be heard by an NLRB administrative law judge or can file a complaint seeking injunctive relief in federal district court. 29 U.S.C. § 160(b),(e). An employer may enter into a settlement agreement with the NLRB

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at any stage of the process and most commonly through a non-board settlement, informal settlement, formal settlement agreement, or formal settlement stipulation. 29 C.F.R. § 101.7, 101.9; *NLRB Case Handling Manual*, § 10124 et seq. If an employer does not settle, the complaint will be heard by an NLRB administrative law judge. 29 C.F.R. § 101.10, .11. An employer may appeal the findings and decision of an ALJ to the full NLRB. 29 C.F.R. § 101.11. An employer may appeal the findings and decision of the full NLRB to the appropriate United States Court of Appeals. 29 U.S.C. § 160(ff); 29 C.F.R. § 101.14. Again, as in the OSHA context, automatically labeling an initial agency complaint as a violation and then allowing the evaluation and use by the ALCA and the contracting officer – despite the ongoing proceeding before the ALJ and/or the Board – punishes the employer in the absence of any actual finding of liability. To reiterate, the proposed rule and guidance labels an ongoing dispute as employer liability for a violation – which it is not. If the complaint is withdrawn or the employer appeals a decision by an ALJ or the NLRB against it, it is not fully adjudicated and cannot be a reportable AMD and thereby labeled a “violation”. The AMD definition should be clear that it is only where liability is final and not appealable that the agency’s action can be an AMD and thereby deemed a violation.

This type of short-circuit of the adjudicatory process is even more striking in the context of the various statutes before the Equal Employment Opportunity Commission, including Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA). Title VII, the ADA, and the ADEA all require that an aggrieved person file a charge of discrimination or retaliation with the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. § 2000e-5(b); 42 U.S.C. § 12117(a); 29 U.S.C. § 626(c). Prior to determining if there is reasonable cause of a violation, the EEOC may encourage the parties to settle the charge. The EEOC typically signs any settlement agreement between the parties. 29 C.F.R. § 1601.20. If, after an investigation, the EEOC determines there is “no reasonable cause” that a violation occurred, the EEOC shall dismiss the charge. 42 U.S.C. § 2000e-5(b). After the EEOC notifies the charging party of the dismissal, the EEOC’s jurisdiction over the charge is terminated and the charging party has 90 days to file a civil action against the employer. 42 U.S.C. § 2000e-5(f); 29 C.F.R. § 1601.28(a)(3),(4). If, after an investigation, the EEOC determines there is “reasonable cause” that a violation occurred, the EEOC “shall” attempt to resolve the charge through “conciliation” with the employer. 42 U.S.C. § 2000e-5(b). If conciliation fails, the EEOC may file a civil action against the employer. Alternatively, if it chooses not file a civil action, the EEOC shall notify the charging party who then has 90 days to file a civil action against the employer. 42 U.S.C. § 2000e-5(f); 29 C.F.R. § 1601.28(b). Once a civil action has been filed, the parties have the normal rights of appeal and settlement as in other civil matters.

The numbers of cases where employers would be prematurely be deemed in violation grows even further with the definition of AMDs including pre-complaint preliminary reviews like the EEOC reasonable cause determinations. Out of the 2,745 EEOC reasonable cause findings in FY2014, only a fraction actually resulted in any court complaint. See <http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm>. For example in FY2014, there were only 133 instances where charges were pursued in litigation by the agency. See <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>. So, again, even with a reasonable cause finding, the vast majority of those cases result in no actual proof or finding of a violation. Requiring the reporting and consideration of a reasonable cause determination or pre-complaint preliminary reviews is tantamount to sentencing the accused for the crime upon arrest, despite any

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protest from the accused of her innocence and in the absence of a trial. This is contrary to the statutory construct and cannot stand. The AMD definition should be clear that it is only where there is a conciliation agreement that admits employer liability that an EEOC action can be an AMD and thereby deemed a violation.

- ii. The proposed AMD definition illegally circumvents the due process requirements of the underlying statutes that require proof of the violation before punishment.

Rather than awaiting an actual judicial decision on liability to announce a violation has occurred, the proposed guidance inappropriately attempts to impose liability at the agency complaint stage. This flips the burden of proof under the applicable laws on its head, forcing the contractor to now prove its innocence to avoid a premature judgment in the responsibility determination process. For example, in a Title VII matter, an EEOC reasonable cause determination does not equate to a finding of employer liability. Instead, the employer can disagree with the reasonable cause finding, and then either the EEOC must pursue litigation in federal court, the charging party can pursue litigation in federal court, or the matter is simply dropped. In the end, it is only if a federal court finds by a preponderance of the evidence that an employer has engaged in discrimination under Title VII, that there is an actual violation. Another example of circumvention can be found in the guidance proposal to elevate to “violation” any “Letter” from the agency indicating that an investigation disclosed a violation of sections six or seven of FLSA or violation of Family Medical Leave Act (FMLA), Service Contract Act (SCA), Defense Base Act (DBA) or E.O. 13658. This assessment at the investigation stage is not a final agency action and is not a finding of legal liability. It is simply a preliminary step, where the employer retains the right to contest that finding and defend itself against the investigatory finding. The immediate elevation of this preliminary assessment to a “violation” again removes the due process afforded to the employer under the applicable statute and regulations. The generic reference to “letters” from the agency should not be included in the AMD definition, as they are not violations.

The proposed rule and guidance attempts to create a reportable “violation” only based on the agency preliminary assessment, without establishing actual proof of such violation. Reporting at this stage illegally thrusts the burden of proof on the employer before the ALCA and contracting officer. Moreover, Title VII does not impose any punishment or damages on an employer until a federal court determines that the employer is liable and imposes such damages. The proposed rule and guidance attempt to illegally add an additional damage provision – a finding of non-responsibility – beyond the damages afforded under the statute, as well as prior to the liability stage dictated in the statute. The fact that the agency could dictate a “violation” where the case is never pursued or where a federal court years later finds in favor of the employer flies in the face of the statute. In sum, there can be no administrative merits determination under the statutes enforced by the EEOC.

- iii. The proposed AMD definition guarantees that responsibility determinations would be based on an erroneous record.

Not only does the elevation of the proposed administrative merits determination violate an employer’s statutorily afforded due process under the statutes, the clear statistical evidence reveals the potential for mistake by labeling violations so early in the process.

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Based on NLRB and EEOC statistics, only a fraction of complaints or reasonable cause findings issued by those agencies result in a court order of a statutory violation. For example, in 2014, approximately 88,778 charges were filed with the EEOC; 2745 probable cause findings were issued in 2014; and the EEOC filed 167 lawsuits in 2014 (which doesn’t indicate if the lawsuits were successful or not). Of the 3836 total OFCCP audits in 2014, 567 closed with violations and 81 closed with “serious” violations.

In 2014, a total of 20,415 Unfair Labor Practice (ULP) charges were filed with the NLRB with only 1,216 complaints issued. Of these complaints, the NLRB had 7251 ULP charges withdrawn, 7209 were closed through settlement prior to the issuance of a complaint, 5055 were formally dismissed for lack of merit, and only 421 charges resulted in a formal NLRB determination. See <https://www.nlrb.gov/news-outreach/graphs-data>. Reflecting on these numbers, almost two thirds of those employers against whom a complaint is issued are not found to have violated the Act. But, under the proposed guidance, any contractor within that two-thirds bucket would be unjustly saddled with the label of “NLRA violator.” Any criteria for establishing an AMD that creates a sixty-six percent chance of error is a grossly distorted measure for determining whether a contractor is a responsible party. And using that 66% assumes that all 421 Board Orders found a violation, when in fact that is not the case. Finally, the length of time between a complaint being issued by the Regional Director and the Board issuing an Order can be lengthy. Because award decisions cannot generally be delayed for such a length of time, it is unlikely that the unjustly labeled “violator” will receive the award and the business will be lost to the potential prime contractor or subcontractor.

The proposed guideline’s AMD definition takes this ill-advised approach of including as a “violation” any and all agency complaints filed with a court or ALJ. This simply expands the instances of premature and inappropriate consideration of complaints before they have resulted in any final determination of an actual violation. Contractors would have to defend against those complaints not just in court or before the administrative judge, but also defend against those complaints before the ALCAs in each contract award decision.

- iv. The proposed AMD definition would potentially saddle contractors with “violations” for years in cases where a federal court rules that the agency complaint overreached and there was no violation.

The guidance inappropriately saddles contractors with a “violation” at the complaint stage of the adversarial process, where the vast majority of claims end in the employers favor without any finding of liability. This subjects contractors to reporting “violations” even where the agency is overreaching in its purported application of the law. Two recent examples are the EEOC’s failed attempt to push its restrictive view of the use of credit and criminal background checks and the Department of Labor’s bad faith pursuit of Fair Labor Standards Act claims.

If the overly broad AMD definition were in place, under the EEOC’s recent litigation posture, EEOC complaints inappropriately challenging legitimate background investigations would be deemed violations, where in reality there were no violations found. The EEOC filed two high-profile credit and criminal background check cases in 2010. In affirming the EEOC’s defeat at summary judgment, the U.S.

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Court of Appeals for the Sixth Circuit questioned the EEOC’s statistical analysis and criticized the EEOC for attacking the same type of background check that the EEOC itself uses. *EEOC v. Kaplan Higher Educ. Corp.*, 748 F.3d 749 (6th Cir. 2014). The Fourth Circuit reached a similar conclusion. *EEOC v. Freeman*, No. 13-2365, 2015 U.S. App. LEXIS 2592 (4th Cir. 2015).

Applying the example of the Kaplan case to the proposed AMD definition highlights the lengthy injustice and erroneous nature of the information that would be considered. In the *Kaplan* case, the EEOC filed the federal court complaint in December 2010, and the district court dismissed the lawsuit in January 2013. So, this complaint would be reported as a violation for almost the entire reporting period contemplated under the proposed rule when, in fact, there was no violation at all. Moreover, as explained in more detail below, the proposed DOL guidance would not only call the complaint a “violation,” but would slap the contractor with a “serious” “violation”, forcing the contractor to either (A) continuing its defense against the EEOC’s complaint and risk the ALCA advising that the contractor is not responsible and the CO concurring with that in a responsibility determination, or (B) try to negotiate a LCA with the EEOC in a situation where the adjudicative process would find that there was no actual violation at all.

Another example highlighting how the inequity in the proposed AMD definition is the recent federal appellate court decision against the Department of Labor in *Gate Guard Services, LP v. Perez*, No. 14-40585, 2015 BL 212957 (5th Cir. July 2, 2015). In *Gate Guard*, not only did the federal district court reject the DoL’s pursuit of the case, the court held that the government’s conduct was oppressive and its case legally frivolous, and the Fifth Circuit agreed that the district court should evaluate the level of attorneys’ fees that DOL must pay to Gate Guard. Again, if the proposed AMD definition were applied to this case, the contractors would have to report a violation for well over two years (from the 2010 filing of the complaint until the 2013 dismissal of the case), and again, it would be characterized a serious violation involving an allegation related to 400 guards – all in a case where the Circuit Judge criticized the government’s actions:

At nearly every turn, this Department of Labor (“DOL”) investigation and prosecution violated the department’s internal procedures and ethical litigation practices. Even after the DOL discovered that its lead investigator conducted an investigation for which he was not trained, concluded Gate Guard was violating the Fair Labor Standards Act (“FLSA”) based on just three interviews, destroyed evidence, ambushed a low-level employee for an interview without counsel, and demanded a grossly inflated multi-million dollar penalty, the government pressed on. In litigation, the government opposed routine case administration motions, refused to produce relevant information, and stonewalled the deposition of its lead investigator....*Id.* at 1 (“We hold that attorneys’ fees are appropriate under the EAJA’s bad faith provision....”).

These examples highlight why the proposed AMD definition of requiring reporting complaints as tantamount to a proven violation cannot stand. The measured procedures and burdens of proof established in the underlying statutes avoid the proposed definition’s rush to judgment in a responsibility determination where there may simply be no violation of law. Moreover, these examples

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highlight the proposed definition’s path to wasting agency and contractor resources on negotiating and implementing a LCA in order to receive a favorable responsibility determination where there is no underlying “violation” and the inefficiency and increased costs that will be incurred where the agency and contractor are concurrently spending money litigating.

- v. The governments stated preference for use of LCAs is without assurance of fairness in the contemplated process.

Under the construct created by the rule and the guidance, contractors would be faced with the impossible choice of forgoing their rights and entering into a LCA or risking a negative responsibility determination for not conceding to the agency’s preliminary assessment of the charge. The most recent Supreme Court decision in *Mach Mining* clarified there is also necessary judicial review to ensure that the EEOC follows the statutory requirement to conciliate with employers following a reasonable cause determination. See *Mach Mining, LLC v. EEOC*, U.S. 135 S. Ct. 1645 (2015). Unlike the statutory construct under Title VII, however, the proposed rule and guidance does not appear to include any recourse for a contractor to challenge the fairness of the LCA negotiation process contemplated by proposed guidance. The proposed rule and guidance inappropriately place a determination of the good faith effort of the employer and the EEOC in conciliation in the hands of an ALCA or CO, rather than a federal court where the Supreme Court dictates that it belongs.

- vi. The proposed guidelines’ transformation of initial agency action into a deemed “violation” is counterproductive to the goals of legal compliance and government efficiency.

The proposal would be counterproductive to the goals of legal compliance for the government and for contractors, as well as establish an inefficient mechanism that would divert or waste resources. For example, under the proposed rule, all OSHA Citations would need to be disclosed. A majority of these citations, however, are ultimately withdrawn or resolved without a finding of violation indicated in the initial citation, through the statutory and regulatory settlement or adjudication process. An ALCA and CO would be faced with a requirement to consider these reported deemed “violations”, only to have the citations resolved in the adjudicative process in the best interests of the agency, the employer, and the employees and no longer qualify as a reportable “violation.” For these reasons, and the others articulated herein, OSHA citations should not be included in the AMD definition unless the citation has become a final determination that is not subject to appeal or challenge.

In this same vein, the guidance turns historical efforts to amicably settle wage and hour claims into the threat of the finding of a “violation.” For years, the WH-56 Form has been a mechanism to settle real differences between the specific wage and hour investigator and the employer who is being investigated. The Form is a statement that indicates that the employer has agreed to pay certain “unpaid wages” to the listed employees pursuant to a specific statute (e.g., the Fair Labor Standards Act). The WH-56 has been used as a practical and effective means of resolving complaints short of the litigation process. There are instances, however, where the WH-56 is employed through no fault of the employer. For example, when the government agency fails to include appropriate contractual clauses

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regarding the applicability of the Service Contract Act (SCA), the resultant dispute frequently is resolved through issuance of a WH-56.

By turning this pre-litigation settlement vehicle into an automatic “violation”, the proposed rule and guidance will push employers to continue through an adversarial process, wasting government resources and prolonging resolution for employees. Turning agency preliminary assessments into violations will not serve the goal of the Executive Order or advance the compliance efforts of the employers who are investigated, but simply force contractors to litigate to clear their name. Actions using Form WH-56 should not be included in the AMD definition and should not be reportable.

- vii. By reaching back to preliminary findings (rather than, for example, agency final, unappealable orders), the proposed guidance runs the serious risk of inconsistent and changing results related to the same contractor conduct.

Using a broad definition of AMDs, as the guidance and proposed rule do, results in violations being reportable, even if subsequently adjudicated in the contractors favor or settled with no admission of liability. Further, sweeping reporting of pre-litigation “violations” will result in many items being first reported and evaluated as “serious,” exposing the contractor to potential suspension and debarment, only to be then viewed by the same agency (and potentially evaluated again by the same ALCA) as allowing a determination that the same contractor is a responsible party. This condition further highlights that these preliminary assessments should not be part of the AMD definition, as they are too early in the statutory and regulatory process to constitute actual “violations”. In sum, the proposed definitions used to assess reported “violations” are so overly broad and vague that they will result in unnecessary over-reporting, while at the same time stripping contractors of their statutory rights.

b. Proposed evaluation definitions are overbroad and inconsistent with the law.

We agree with the Department of Labor that “all violations of federal labor laws are serious”, but identify a number of flaws and unintended consequences in its evaluative definitions of “serious,” “willful,” “repeated,” and “pervasive.” Contrary to the Executive Order’s directive of efficiency and cost savings, the proposed evaluative definitions will result in virtually all labor and employment agency findings at whatever stage to be viewed as serious, willful, repeated, and/or pervasive. This mass of reported violations that fall within these broad definitions will clog the system with labor compliance advisor evaluations, cause confusion among contracting officers, and lead to inconsistent evaluations, as it becomes clear that the definitions do not differentiate between bad actors and the vast majority of the rest of the contractor community. In other words, contracting officers and labor compliance advisors will be in the unenviable position of determining which contractor has more serious, willful or repeated violations or acted in a manner that was more pervasive than another contractor, leading to inconsistent, arbitrary and capricious results. And the goal of efficiency and cost savings cannot be served by every contractor being forced to negotiate a labor compliance agreement with multiple labor and employment agencies across the government. The resource pull on both the government agencies and contractor community would be unmanageable. The impracticality and difficulty of the evaluative definitions are compounded significantly in conjunction with the discussion above regarding a “violation” as defined in the guidance and implemented in the rule.

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i. The vast definition of “serious” does not focus on the “violations” that are most concerning.

A. *Including all “serious” OSHA citations will flood the system with deemed “violations” that are not violations at all.*

The proposed definition of “serious” includes OSHA citations labeled by the agency as “serious” under the OSH Act. The combination, however, of the vast definition of AMD and the statute’s definition of serious would require 80% of all OSHA citations to be reported as a serious violation, mixing up the worst actors with everyone else. The majority of OSHA citations are then resolved by either being withdrawn or entering into an informal agreement with the agency, but not with any finding of an actual violation. In fact, informal agreements with OSHA regarding citations routinely and clearly indicate that the employer does not admit any liability. In other words, these “serious” citations, on which the contractor is unjustly judged, are nothing of the sort.

B. *The “serious” 25% threshold is too low, lacks any reasonable minimum for smaller sites, and requires more robust definitions like the WARN Act.*

The 25% workforce threshold triggering “serious” will lead to disproportionate results in the absence of a clearer minimum threshold. For example, many contractors provide specific services across multiple sites where small numbers of employees have as their place of employment a government site. At a small site of four employees working on IT services, for example, even a single violation for one employee could inappropriately trip the “serious” threshold. Any percentage-based threshold should, at the least, have a minimum threshold, such as the Worker Adjustment and Retraining Notification Act (WARN Act) 50-person threshold. Further, the description of single site could also borrow from the clear and developed statutory and regulatory provisions of the WARN Act. See 29 U.S.C. §§ 2101-2109; 20 C.F.R. §§ 639.1-639.10.

That being said, even a 25% marker with a number threshold would likely result in a “serious” designation where the “violation” should not be deemed serious. For example, the NLRB has struck down provisions of handbooks in non-union workplaces, taking the position that the handbook provision chilled the employees’ exercise of their Section 7 rights to engage in concerted activities. The handbook, of course, would apply to the entire workforce, and thus would trigger the 25% threshold. Even in cases where the Board or court determined, however, that there was no specific violation of the NLRA with respect to the complaining employee (e.g., the Company appropriately discharged the employee), the handbook provision (which is corrected as part of the remedy in the case) would be a serious violation.

C. *Labeling any injunctive relief a “serious” violation is over-inclusive, capturing, for example, and inappropriately labeling all NLRB ALJ and Board decisions against an employer as serious.*

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The proposed “serious” definition is overbroad in including any and all injunctive relief. For example, every single ALJ decision and NLRB decision that finds against an employer includes injunctive relief, no matter how minor the infraction (or until such decision is overturned by the federal courts of appeal. Under the guidance and proposed rule, all of these actions would be considered “serious.” Specifically, an NLRB finding against an employer in an unfair labor practice charge proceeding will include injunctive relief requiring the employer to post a notice. The E.O. could not possibly have intended to expand the definition of serious to all NLRB findings against any contractor, no matter the type of violation or circumstance. Such an overly broad application of terminology cannot accomplish the goal of the guidance to identify violations that are most concerning.

Let’s take the recent case of *Cooper Tire & Rubber Company*, 08-CA-087155 (ALJ Dec. June 5, 2015) (appeal pending) as an example. In this case, an arbitrator found that the employee was discharged for just cause when he made racial slurs at workers crossing a picket line, in violation of the Company’s harassment policy. *Id.* at 6-7. In response to an unfair labor practice charge, however, the Regional Director determined that the NLRB should not defer to the arbitrator and should pursue a complaint against the employer. The ALJ found that the employer violated the NLRA and, as with all such remedies, ordered the employer to reinstate the employee and post a notice in the workplace (among other things). Although the employer is appealing this decision to the Board, the preliminary stage order of injunctive relief would be deemed a “serious” violation. It cannot stand that somehow the conduct of the employee making the racial slurs is not serious, but the employer that stands up for its rights to discharge someone for violating its harassment policy is a “serious” NLRA “violation” (for the years until they are able to obtain relief on appeal to the Board or Court of Appeals). Forcing the ALCAs and COs to sift through all complaints, ALJ decisions, and Board decisions because the rule deems them “serious” violations in order to determine which ones are actually serious is simply counter to the goals of contracting efficiency demanded by the E.O. Injunctive relief in and of itself should not be deemed “serious,” unless combined with additional criteria that warrant a serious label and identify the most concerning violations.

- ii. Including an overbroad “interference” category of serious violations strip contractors of their legal right to defend themselves from agency overreach.

Another area of concern is the inclusion of a catch-all “interference” category of “serious” where the proposed guidance includes in the definition a category of “violations” where the contractor allegedly interfered with the agency’s investigation. Examples provided include denial of access to conduct an on-site investigation, evaluation or review; refusal to submit required documents or comply with information request; threats to workers who speak to enforcement agency investigators; and lying or making misrepresentations to investigators. This type of broad, uncontrolled category will inevitably pull into the category “serious” mere disagreements with contractor employers regarding the scope and conduct of investigations, without any mechanism to challenge or defend against a label of interference.

For example, under the current statutory and regulatory structure, if an employer takes the position that the EEOC investigation is overbroad and inappropriate, it may refuse to provide certain information and documents, and then the EEOC can decide whether or not to subpoena those records. Under the proposed guidance, such a position would likely be viewed as “interference,” and therefore, would

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expose the contractor employer to being deemed a serious violator if the EEOC’s investigation resulted in a reasonable cause determination. Accordingly, the “serious” label based on “interference” could be affixed, even if the EEOC did not pursue its alleged right to obtain the information and documents through a subpoena. There should absolutely be no interference label where the agency fails to use its established enforcement mechanisms to obtain the information it feels it needs to pursue an investigation.

Moreover, the proposed “interference” category could inappropriately include situations where the employer challenges an EEOC’s subpoena. Win or lose, it is the employer’s right to challenge the EEOC subpoena power in cases where it feels that the EEOC is exceeding its investigatory authority under the statute and regulations. The proposed rule and guidance should not strip employers of their rights to defend themselves. And, in a number of cases, courts have agreed that the EEOC has overreached and quashed EEOC subpoenas. *See, e.g., EEOC v. Burlington N. Santa Fe Ry. Co.*, 669 F.3d 1154 (10th Cir. 2012) (affirming district court’s quashing of EEOC “fishing expedition” subpoena); *see also EEOC v. United Airlines*, 287 F.3d 643 (7th Cir. 2002); *EEOC v. Southern Farm Bureau Casualty Ins. Co.*, 271 F.3d 209 (5th Cir. 2001); *EEOC v. Randstad et al*, 765 F. Supp. 2d 734 (D. Md. 2011).

This is just one of many examples of where agencies could claim “interference”, when employers are simply defending their rights. What if an employer exercises its rights in an OSHA inspection situation to demand an inspection warrant? Will the agency then view the employer’s action as a “serious” violation, even if a resulting citation is not “serious” under the regulatory construct? Will disagreeing with an agency’s legal position be deemed “interference”? Will losing a court effort to limit an investigation then be deemed to be “interference”? The proposed “interference” category under the “serious” definition is overly broad and inconsistent with the legal framework established in the governing statutes and regulations that are designed to check and balance agency action.

Expanding the definition of “serious” in the manner proposed mandates a level of deemed “cooperation” that is unachievable in defending the contractors’ rights under the applicable statutory and regulatory processes. In a recent hearing before the House Education and Workforce Committee’s Subcommittee on Workforce Protections, a witness representing the U.S. Chamber of Commerce testified as to questionable tactics by the Department of Labor Wage and Hour Division in conducting investigations and pressuring settlement. *See* Testimony of Leonard Court, “Reviewing the rules and Regulations Implementing Federal Wage and Hour Standards”, U.S. House of Representatives Committee on Education and Workforce Subcommittee on Workforce Protections (June 10, 2015). This begs the question as to whether contractors will be forced to succumb to these types of tactics or jeopardize being deemed a responsible party by an agency determining they were not cooperative enough in its investigation. In sum, the definition of serious is vague and overbroad and subject to inconsistent application and abuse, particularly when combined with the overbroad AMD definition.

- iii. The proposed definition of “willful” must require a specific finding that is not subject to appeal.

For the same reason that the AMD definition should not and cannot include preliminary assessments by an agency, the definition of willful should be limited to a specific finding that is not subject to appeal.

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For purposes of the statutes that define willful and place a specific remedy on such willful finding, it requires proof in the adjudicatory process, and only upon that final finding not subject to appeal, can the remedy be applied. Anything less would expand the application of the statute beyond what Congress intended. The proposed guidance should be revised so as not to contravene this statutory dictate.

With respect to statutes that do not define willful, the proposed definition would rely on an undefined assessment that the employer “knew that its conduct was prohibited” or “showed reckless disregard or plain indifference”. Without revision, this would allow an agency investigation conclusion that an employer’s alleged action is willful in the context of a statutory framework that did not define the term and which leaves the employer without any recourse to challenge the investigation or the label. Further, even in the absence of an agency investigation applying a willful label, the proposed guidance would inappropriately leave the determination to the discretion of the ALCA, which will inevitably result in inconsistent application and potential abuse of discretion, all without an avenue for review of the willful label by the contractor employer. The untested and unproven “willful” label leaves out any statutory adversarial process or burden of proof. Instead, any inclusion of willful outside of the statutory definition and process should require the same type of proof in the adjudicatory process that is required under those statutes.

- iv. The proposed guidance expands “repeated” to dissimilar violations within broad statutory constructs and even violations of different statutes.

Outside of the statutes with definitions of repeated, the proposed guidance unnecessarily expands the definition of “repeated” to encompass separate and unrelated violations. For example, the explanation of what would be covered under “repeated” could arguably include violation of the FLSA overtime regulations based on a complaint by a non-exempt employee, combined with a challenge to an employee’s exempt status in a different organization of the same site or different site altogether. With both claiming failure to pay overtime, albeit for completely different reasons, they would be labeled “repeated.” The guidance should be amended to narrow the repeated definition to more specific statutory violations. “Repeated,” as proposed, would also include completely separate and distinct retaliation violations under different statutes, in different locations, and by different actors. This distorts “repeated” into a label that simply means multiple. This expanded reach will cause an over-labeling of contractors as “repeated” violators, which will only flood the pool and make it more difficult to distinguish between the true, repeated violators and companies who simply have a dispersed and/or decentralized organization. “Repeated” should be limited to the same provision of the same statute in the same location. This will focus on the true repeat violators.

- c. *Conclusion: The defective functionality of the guidance and the rule must be addressed before implementation.*

We have serious concerns that the redefining of terms in the DoL guidance and their application in this proposed rule will require contractors to report violations based on an AMD, and not a finding of fault in law, and could equate an agency preliminary assessment or employee complaint with a violation of a law. Such an interpretation of the terms and their application in the context of this proposal would strip

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federal contractors of due process currently afforded in labor law compliance regimes. AMDs should exclude those that are not final or are subject to further review. A determination of contractor responsibility should be based upon only final decisions and not those subject to additional review as it may bias the decision by relying on findings that could later be reversed.

The expansive definition of administrative merits determination and the overbroad and malleable violation assessment definitions will not serve the Executive Order’s stated goal. Vast numbers of reportable “violations” will overwhelm the system (once one is created) and require an expanded and unnecessary bureaucracy (duplicative of the already established labor and employment agency processes). ALCAs will be overloaded and unable to respond to contracting officers within the requisite three days. Either the delayed ALCA review will slow down the contracting process while the contracting officer waits for ALCAs to get through the backlog, or contracting officers will proceed in the absence of an ALCA recommendation, resulting in inconsistent (and likely arbitrary and capricious) outcomes among contracting officers, agencies, and suspension and debarment authorities. And even ALCAs will be faced with constantly changing reportable violations as each preliminary and appealable step is considered and evaluated, also leading to inconsistent (and likely arbitrary and capricious) outcomes for the same contractor on different contracts and at different points in time, albeit based on the same underlying conduct. Moreover, the definitions do an end-run around the established statutory and regulatory enforcement and adjudication requirements, drive employers to succumb to whatever investigation tactic they encounter, and force a level of negotiation of LCA that strip contractors of their due process rights. All of this will simply add to the cost and inefficiency of the contracting process and will certainly not differentiate between the worst actors and the vast majority of contractors who have established internal compliance programs and strive to do the right thing in running their business and ensuring they are good stewards of taxpayer dollars.

Because of these deficiencies in the guidance and the application of these terms and definitions in the proposed rule, industry once again reiterates that the guidance and proposed rule should be withdrawn until such time as their shortcomings can be addressed.

2. The Rule Effectively Allows DoL to Blacklist Contractors and Subcontractors Based on Purported Violations of Labor Law.

The rule is the latest attempt to inappropriately utilize the acquisition system to impose overbroad labor law requirements on federal contractors.³ Unlike prior attempts, this FAR proposed rule implicates many more complex labor and anti-discrimination laws and reaches much deeper into the federal supply chain than previous failed rulemaking. By using the “stick” of a DoL recommended finding of non-responsibility, this rule would create a “blacklist” of contractors who, based primarily on the findings of DOL, will be deemed ineligible for federal contracting or subcontracting.

³ An earlier iteration of this “Blacklisting” approach was promulgated during the Clinton administration, and led to a lengthy struggle between government and the industrial base over implementation ultimately leading to rescission of that rule. Contractor Responsibility, 65 Fed. Reg. 40830, 40833 (June 30, 2000). Similarly, in 2012, the Department of Agriculture (DOA) also attempted to insert a broad labor law disclosure framework into their responsibility determination regulatory process. Ultimately, the number of adverse public comments submitted in response to this proposed change persuaded the agency to retract the rulemaking.

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a. The proposal creates undue pressure on the role and discretion of the contracting officer.

As a process matter, the proposed rule requires a pre-award assessment of labor compliance, facilitated via a solicitation representation, by the CO for every prospective contract and subcontract award over \$500,000 contemplated by the federal government. For companies that bid on multiple opportunities, the CO assessment will create a disproportionate and costly process burden on offerors engaged in the procurement process. Given the scale of the rules, and the nature of the laws being enforced, there is a high risk that the assessments will lead to many unexpected outcomes for the offeror and their supply chain. Based on a lengthy history of risk-averse CO behavior, it is reasonable to conclude that different COs and ALCAs will make assessments about a contractor's labor disclosures and come to different conclusions after reviewing identical information about a contractor's compliance with labor laws over the prior three year period. Similarly, prime contractors and yet-to-be-established functions within DoL will make determinations about subcontractors without any involvement of CO's or ALCAs.

Because the transactional environment is so fast moving, and the tendency to make judgments in that environment about complex data without the necessary predicate subject matter knowledge, a contractor could be determined to be “presently responsible” by one CO, but be found “not presently responsible” by another CO based on identical information. This potential for inconsistent application caused by the lack of subject matter expertise at the CO and ALCA levels alike, and the added pressure of conforming to conclusions stored in federal databases, creates enormous risk and uncertainty for both the government and contractors. Alternatively, once one CO makes a determination that a contractor is not a responsible source, based on such an idiosyncratic analysis, it is reasonable to conclude that other COs will avoid the risk of oversight scrutiny and come to the same conclusion to exclude a source as not responsible, especially where repositories such as Federal Awardee Performance and Integrity Information System (FAPIIS), System for Award Management (SAM), Contract Business Analysis Repository (CBAR), and Contractor Performance Assessment Reporting System (CPARS) exist to store and disseminate that data to all manner of agency operatives at different points in the acquisition process and for substantially different purposes.

COs will be under enormous pressure to conform to the “advice” of the ALCAs even if it is not in the best interest of the taxpayer and they will be expected by their superiors to avoid inconsistency or the heightened risk of increased scrutiny from an ALCA, their subject matter superiors at DoL or the extant oversight community. Such pressure would also be bestowed upon prime contractors that receive guidance from DoL to avoid using certain subcontractors, even though the affected subcontractor may ultimately be cleared of any wrongdoing. When a supplier is found not responsible, the prime will not only cease to consider using that “tainted” supplier for the award under consideration, but it is almost certain, for risk mitigation purposes, that the supplier will be considered ineligible for other federal contracts or transactions across the entire supply chain with that prime contractor, or the prime could risk allegations that they are not adhering to business ethics standards in FAR Part 9. Such exclusion would quickly become public knowledge across the industrial base and the ripple effect from exclusion would likely spread across the entire market.

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It is thus very likely from the process implicated in the rules that differing conclusions by COs or ALCAs based on identical facts, and/or successive non-responsibility determinations based on the same operative set of facts stemming from a labor law “violation” could amount to double jeopardy for an offeror and create a “blacklist”, which dominoes into a “de facto” debarment that acts to informally, and without the due process offered in FAR Part 9, limit or exclude otherwise responsible offerors from competing for federal contracts. Courts have found in such cases, that where a CO makes such repeated non-responsible findings based on the same facts, the offeror is entitled to the initiation of formal debarment proceedings and corrective action.⁴

In an unprecedented alteration of the existing acquisition authority, which concentrates authority on the CO, this proposed regime invents a new ALCA, designed to “advise” the CO on the import of information provided to the CO regarding a contractor’s labor law compliance. Undermining the CO’s historical role as the authority for making determinations of responsibility, instead the CO must now incorporate and, likely, defer to the determination of an ALCA, provided without any greater context regarding the subject procurement, the agency’s needs, or the particular history with that contractor. Although the CO will ostensibly remain the authority for making the responsibility determination, it can reasonably be expected that the CO, not wishing to attract unwanted scrutiny for disregarding the advice of the ALCA - even if in the best interest of the taxpayer - would most likely seek to avoid controversy and choose an alternative awardee for the contract.

It can reasonably be expected that once one ALCA directs a CO to find a contractor non-responsible, this finding will be propagated across the federal contractor and acquisition workforces, if not unofficially as a means of avoiding risk, then officially as part of the advice ALCAs and DoL will offer to other COs and to primes who seek information about potential subcontractors and suppliers they may use. Thus, any contractor found by an ALCA as non-responsible will be effectively “blacklisted” across the entire government market.

b. The guidance and proposed rule will detrimentally impact the viability of business and create prohibitive barriers to sustainment and entry in the federal market.

To avoid these devastating consequences, it stands to reason that contractors will take any measure possible to avoid running afoul of the ALCA. Thus, the ALCA will have unprecedented power over the contracting community to impose on individual contractor’s novel compliance obligations—above and beyond what is required under existing labor law—through labor compliance agreements. Contractors determined by an ALCA to have an unacceptable history of purported labor law non-compliances can mitigate this finding by agreeing to the requirements of a “Labor Compliance Agreement.” Through this new contractor agreement, the ALCA can mandate that the contractor adopt any number of new compliance requirements—outside of the normal regulatory process and without due process for the contractor—or face addition to the “blacklist” of non-responsible contractors. Notably, even if a contractor chooses not to continue pursuing government contracts following such a finding of non-responsibility, this black mark will likely have a negative impact on commercial business, as many companies rely on government findings of non-responsibility as a basis not to contract with commercial

⁴ *Shermco Indus. V. Secretary of the Air Force*, 584 F. Supp. 76, 94 (N.D. Tex. 1984)

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entities. Through these LCAs, the ALCA will essentially have the power to ply and leverage contractors into changing their practices to meet the requirements imposed by the individual ALCA, without reference to the cost or utility of these changes. By using this mechanism, DoL can essentially impose on some of the country’s largest companies novel requirements without going through the normal process of regulatory promulgation or legislative adoption.

The risk to many companies, particularly companies who are primarily commercial businesses and who may be a supplier on a government contract, would be prohibitive. Facing the potential consequence of being forced into accepting a LCA, many companies will likely opt not to pursue government contracts. Significant effects of this proposal will be to force companies out of the federal market and to erect insurmountable barriers to entry for others, particularly non-traditional contractors, the attraction of which are the specific focus of this administration.

Damage to the viability of the company would also likely occur from enforcement of clauses that exist in many commercial contracts and contracts with other countries that require cancellation should the company become unable to contract with the U.S. government. The ramifications on the U.S. economy from lost business and the global corporate standing of U.S. based companies that were not able to continue to work in other sectors or in other countries would be dramatic. The risk to many companies, particularly companies who are primarily commercial businesses and who may be a supplier to a prime on a government contract, would be prohibitive.

c. The government’s stated preference for LCAs can be used to unfairly ply unreasonable concessions from contractors and subcontractors in exchange for affirmative responsibility determinations

The rule limits and subsumes the authority and discretion of the CO in the context of the Labor Compliance Agreements (LCAs). A repeated requirement in the proposed rule involves compelling contractors to enter into LCAs as the sole way to remedy and/or mitigate any alleged labor law violation during the pre-award evaluation process in order to forestall a determination of non-responsibility.

The proposed FAR rules contemplate LCAs as the only sufficient remedy at the exclusion of any other available administrative or legal remedy and the rules require the ALCA to so advise COs of that exclusive option throughout FAR Part 22.2004. The language used at FAR 22.2004-2(b)(3)(i) cites that ALCA’s may provide a recommendation to a CO that a prospective contractor is only either (a) responsible, (b) could be responsible if they have entered into, or are in the process of entering into, a LCA with the DoL or (c) not responsible. At a basic level, such direction forecloses contractors from either defending their actions in any given labor allegation disclosed under the required representations and certifications, and thus compels contractors that want to receive federal contracts over \$500,000 to enter into LCAs or be “de facto” debarred from any contracts by a non-responsibility determination.

Factually, many contractors in the federal sector have thousands of employees in multiple work sites in the US that could be the subject of allegations or actual litigation in any of the named labor statutes at any given time. It is entirely plausible that a contractor undergoing the responsibility determination process will have “violations” (as defined in the rule) that are not fully adjudicated, and the ALCA will be

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charged with advising on that determination under the “serious, willful, repeated or pervasive” standard. Industry is concerned that internal pressure to obtain contracts will force them to trade their legal rights to fully litigate labor violations in exchange for LCA compliance.

There is also concern that unnamed parties to a labor violation could force a contractor into an LCA by simply creating multiple unfounded claims or complaints that could undermine the responsibility determination process. Such actions could be used to force unfavorable labor concessions or terms upon a contractor or subcontractor who would not otherwise have agreed to accept such conditions, but for the need to achieve the ALCA’s or DoL’s favorable advisory opinion. Despite skepticism over such scenarios actually occurring, wherever third-party actors can unduly influence the process and their actions adversely impact the provision of a favorable responsibility determination, there is no limit to the concessions or actions a prospective contractor or subcontractor might be passively or actively coerced into accepting.

The rule’s reliance on a punitive LCA compliance construct thus violates basic labor management law because it prevents contractors from exercising choice of resolution and denies the fundamental right to negotiate mutually beneficial settlements between the parties. Such a “Hobson’s choice” creates undue leverage for the DoL in their enforcement of labor law violations unrelated to the scope of the responsibility determination process and is unnecessary if the aspiration of the DoL is to enhance the efficiency of the federal procurement process, while achieving greater contractor labor law compliance. Such a facially deficient model militates for withdrawal of the proposed guidance and rule and calls for considerable engagement with industry for revision of any rule.

C. *This framework upends longstanding procurement practices and processes and is silent on a number of critical elements.*

It is possible that, in any given procurement situation, all of the prospective offerors could have spotless labor law records. There is, however, a strong likelihood that a percentage of federal contractors and subcontractors will have to make one or more required disclosure of a “violation” of labor law. In that context, it is probable that most, if not all, solicitations for government contracts will become embroiled in the non-transparent administrative and remedial process between the ALCA and the CO, who will seek to craft a legally sufficient responsibility determination prior to making an award. This process will be complicated by a lack of subject matter expertise in both the CO and ALCA functions, conducted by yet to be trained ALCAs, performed by risk averse COs and hampered by language and process barriers at each agency empowered to enforce the relevant labor laws prior to this rulemaking. The inevitable result of such a flawed process will be a terminally inert responsibility determination process with a corresponding slow-down, and potential for a stoppage, of the entire procurement process.

1. *Options for subcontract reporting as proposed for consideration by the FAR Council.*

The proposed model whereby prime contractors consult with the DoL to determine subcontractor or supplier responsibility creates an enormous risk for prime contractors and a cost-prohibitive process for all parties, including many small and non-traditional companies wishing to act as either prime or subcontractor. Because the risks of an adverse responsibility determination are borne by the prime,

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they will be forced to pursue and compile information and update that information on a regular basis in order to effectively manage risk associated with ongoing labor compliance reporting throughout their supply chain.

Finally, the alternative DoL subcontractor verification model posited in the rule makes no assessment of the burdens and costs they create within the proposed rule for either the contractors or the government. Such costs and burden determinations must be made in order to effectively assess whether one option becomes preferable over another in that context.

2. Other elements are not effectively addressed and would create additional disruptions to the acquisition process.

a. Mergers & Acquisitions (M&A) activity could be adversely impacted.

M&A contributes to economic growth by: shifting poor performers from the marketplace; allowing consolidation to eliminate excess capacity in the marketplace; disposition of less profitable companies in favor of emerging industries; allowing new entrants to the marketplace; increasing competition; and, freeing up new resources to innovate.

There is an entire discipline associated with the conduct of due diligence in the M&A world designed to ferret out risk in acquiring an entity and compare profit and loss as a predictor of future economic performance. While the due diligence process typically discloses risks associated with litigation involving the labor force in a company, it is conducted in an closed environment with parties cognizant of the risks in the marketplace and willing to balance those risks with other factors of profitability. It is unclear from the rules, where M&A is concerned, that the labor law “violations” of a legacy company acquired by a new or existing entity or spun off as a matter of economic sense, will require disclosure by the new entity or remain with the old entity. This could become a matter vital to any given contract competition and could act to undermine M&A currently occurring in the federal marketplace and could influence the tendency to use such disclosures as a sustainable grounds for a bid protest.

There is also a sense in the federal marketplace that companies may seek to disavow prior labor law violation liability that could impact their present responsibility per this rule by spinning off companies whose sole purpose is to own the violations. There are all sorts of process gamesmanship and mischief that could develop as a work-around to a negative labor law record by all the parties to a federal competition in any given situation. The rule could thus stifle or constrain a robust M&A environment because of the fear of being held responsible for legacy company violations and being disadvantaged by such disclosures. The FAR Council should clarify the owner of the violations for responsibility determination purposes during the rulemaking.

b. It is unclear how the Small Business Administration Certificate of Competency process will operate under this proposal.

It is also germane that where a small business is determined to be non-responsible for a prime or subcontract over \$500,000, the CO is required to submit the determination and the file record to the

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Small Business Administration (SBA) pursuant to Certificate of Competency (CoC) procedures under FAR 9.103 and 19.601. It is unclear whether the CoC procedures will be subject to the same standards for labor law compliance and responsibility as businesses that are not small or whether the SBA can override any CO labor law based non-responsibility determination unilaterally for small business primes and subcontractors subject to the rules, as they are now able to do under FAR 19.601 for non-labor law non-responsibility determinations. It is equally unclear how and whether a CoC process for a small business subcontractor found to be non-responsible by a CO will be managed and what role either the prime contractor or the ALCA will have in this area. Moreover, is it unclear whether the SBA ALCA or the buying agency ALCA will have jurisdiction over the small business CoC labor law non-responsibility determination.

- c. It is unclear whether and how the proposal affects the breadth of supplier relationships in the global economy.*

Given the global nature of the economy, when it solicits goods and services from the market, the federal government encounters different prime contractor and subcontractor teams comprised of domestic and foreign firms. Whether based on jurisdiction or agreement, generally, it is clear that the impact of this proposal is consistent for all of these firms. What is not clear, however, is the impact of this proposal on indirect supplier relationships unassociated with the performance of a contract for the government. Thus, in order to avoid confusion and the over inclusion of information, the rule and guidance should be modified to assure that those global supplier relationships incidental to or outside the context of the performance of a contract with the government are not intended to be covered by the proposed rule.

- d. The rule does not adequately address current DoD practices regarding business ethics.*

With respect to DoD contracts, this framework fails to acknowledge that the contractor purchasing system requirements already have clear requirements for the procurement of subcontract and supplier resources by DoD contractors. The rules emphasize that DoL will be the oversight agent of such transactional compliance, but the DoL has not heretofore had an ingrained presence in business system oversight conducted by the Defense Contract Management Agency (DCMA) or appear to be institutionally oriented to defer to DCMA for such decisions about business integrity. We recommend that if not withdrawn, the rules phase in any subcontractor certifications over a five-year period as set forth in the conclusion to this letter.

- e. Clarification is required on which corporate “Entity” must report “violations”.*

In many of the proposed FAR clauses, it is not clear whether reportable “violations” are those occurring within the contracting entity, or the national or global corporate entity, including parent and affiliate entities. If the reporting requirements and subcontractor and supplier data collection and reporting requirements will be applicable to all entities within a company—including commercial subsidiaries and affiliates with no contracting with the federal government—the associated compliance costs will dramatically increase. This is because business units of prime contractors offering goods and services to

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the federal government are often prepared and, in the case of the larger transaction values, already deploying government unique compliance requirements across those business units. A good example is the business systems in use at DoD or cost accounting standards in use in federal government contracting. While some companies have regimes in place to address government unique compliance requirements, none of those regimes was established contemplating this proposal and therefore would require in most cases starting from scratch.

Additionally, if the requirements for compliance and reporting apply across a corporate enterprise, then other commercial business units would have difficulty establishing and implementing what would amount to alien requirements not found at all in the commercial market. For mid- and small-sized businesses, the ability and resources to address government-unique compliance requirements vary, but it can be anticipated that almost none would have the business capabilities or resources to be compliant with this proposal and to achieve compliance would be a costly and burdensome process. If these requirements apply across the entire corporate enterprise, for a mid- or small-sized business these would create prohibitive barriers to sustainment or entry into the market.

Industry would recommend that the government follow current regulatory practice applying this to only those entities contracting with the federal government. The government should anticipate further aggravation to the challenges discussed above with attracting and retaining small- and mid-sized companies and other non-traditional contractors should the guidance and rule be clarified as applying across the entire corporate entity. In either case, the rule is currently not clear on that point.

f. Clarification is needed on how Joint Ventures (JV), Partnering/Teaming arrangements are to be reported.

In a JV or partnering/teaming arrangement, multiple companies jointly submit a bid and, upon award, perform work under a contract. The current rule does not provide clarification as to what entity is required to capture and report covered “violations” – the JV entity, the JV members, or all of the above. Moreover, the open question remains as to which entity will carry forward any finding of non-responsibility based on a reported “violation.” Would it be simply the JV entity, or would a participating member company be included on the “blacklist” based on its participation? If the ALCA sought to put in place a LCA, which entity would be required to comply?

g. The rule should provide an exemption for all commercial items.

The proposed rule and guidance exempts suppliers providing commercial off-the-shelf (COTS) subcontracts from the requirements. There is an increasing tendency in recently published FAR rulemaking to provide for exemptions of COTS items, but not commercial items as defined in FAR 2.1. COTS items are commercial items that are sold to the government in the same form (i.e. without modification) that are sold to the general public. It was explicitly recognized in the FAR clauses developed as a result of the seminal acquisition reform statutes that the government frequently made minor modifications to commercially available goods and services, but these items still retained their commercial item identity for other relevant regulatory purposes. Such items were expected to be exempted, to the maximum extent possible, from government-unique requirements that inordinately

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increased the costs to acquire these items or would preclude them from being offered in the government market.

A major reason the commercial item exemptions exist for many federal acquisition requirement is that commercial firms do not have the resources, systems, processes and personnel to comply with unique federal acquisition requirements. Many of the companies that deliver commercial items to the government are the same companies that deliver COTS. They thus have the same challenges with respect to compliance with unique federal requirements. Considering the emphasis on reinvigorating commercial item acquisition principles currently manifest in proposed acquisition reform statutes, and the benefit to be derived from utilizing private sector R&D and development activities, it would be consistent to exempt all commercial items from the rules.

At the time of the seminal reform statutes emphasizing a preference for commercial and COTS items, the government was only in the first stage of transitioning from a government specification world to the use of commercial items as both (1) end items and (2) to integrate underlying commercially developed capabilities into government requirements, including where such items had to be modified to meet those requirements. Congress and acquisition policymakers now recognize the continued criticality of integrating commercial and COTS items into emergent product designs and have advocated vigorously for broader adoption of commercial products and business models into their strategic plans for the future.

Thus, adding new unique and complex federal compliance obligations to the acquisition process where no business or policy case exists such as this rule is a step back from a consensus approach to commercial item usage in the law and reinforced through recent statutes calling for more and broader policy exemptions for commercial items. Commercial items should thus be exempted from this rule in order to conform to the intent of the original statutes (see 41 USC 3306 and 10 USC 2377), and to comply with Congressional and agency strategies to reduce costs and performance risk.

3. The rule unnecessarily impinges on the discretion of the Contracting Officer and establishes a tenuous reliance upon Agency Labor Compliance Advisors.

As noted above, the most important implication to the acquisition process from the creation of the ALCA position and their imposition upon agency contracting responsibilities will be the immense pressure COs will face to concede to the ALCA recommendation. Should the CO ignore or dispute the ALCA's recommendation, the CO is effectively putting a target on their back for an oversight investigation to determine why they did not follow the ALCA's recommendation. Such pressure means that, because of the already risk-averse nature of the CO community, they can be expected to cede some of their authority to exercise discretion in pursuit of best value for the taxpayer. Effectively, an ALCA can compromise the CO's ability to make their own responsibility determination, and yet, not share the responsibility and penalty that a CO assumes if they make a poor determination.

In general, making long term investment decisions on stricter and tighter budgets already hinders the CO's ability to make a business deal that provides for a good return on investments, and unfortunately, this proposed rule further undermines the authorities and responsibilities granted to the CO. As

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envisioned, the ALCA role is an extremely complicated function that has few, if any, comparable models elsewhere in government or the private sector and will essentially be an agency employee working to impose DoL legal requirements on the agency CO. COs are given immense responsibility and authority to spend taxpayer dollars in their roles, and to introduce an outside opinion on contracting matters challenges that authority.

In order for the DoL guidance and the corresponding FAR rules to be implemented efficiently, federal agencies will also have to hire a significant number of new staff to serve as (and support) the role of the ALCAs. Within DoD alone, the ALCA would be required to support the activities of approximately 24,000 COs and hundreds of contracting offices, dealing with tens of thousands of primes and subcontractors of all shapes and sizes, and millions of potential transactions yearly that will be subject to the operative clauses contained in the rulemaking. As stated earlier, the DoD ALCA role is not scaled to meet the demands of this proposed rule. If DoD is not adequately scaled for this implementation, industry is extremely skeptical that much of the rest of government is scaled for implementation either.

Even if the federal government could somehow ramp up its capacity to provide ALCAs and related resources to the federal agencies and prime contractors, a significant amount of time and funding would be needed to train personnel in the new positions to correctly carry out their duties in a fair and consistent manner. These training and funding requirements would also be necessary for the creation of a new office within DoL to assist prime contractors with making assessments about subcontractors. Ironically, CODSIA notes that the recent OMB/DoL implementation memo describing the ALCA selection process within the executive agencies dated March 5, 2015, inexplicably cites that **acquisition knowledge or experience is not required** (emphasis added), which will undoubtedly create increased risks for all parties.

4. Key questions about the subcontractor review process are not addressed in the proposed rule or guidance.

There are key aspects and critical elements of the construct regarding subcontractor mitigation that must be addressed and resolved before this rule can be finalized. If a prime contractor makes an affirmation of present responsibility using information provided by DoL about one of its subcontractors, but an ALCA later reviews the case and makes an alternative determination, what will be the process for dealing with the disagreement? If a potential prime contractor is determined not responsible by a CO, but another prime contractor who uses the same company as a subcontractor on a separate contract determines, based on information provided by DoL, that the subcontractor is presently responsible, how will the discrepancy be handled? Key questions about the overall adjudication role of the ALCA and the ancillary role of the DoL in the subcontract review process must be explored and thoroughly answered before this rulemaking moves forward. In the absence of adequate guidance about the ALCA function, or the enhanced DoL advisory role, some agency personnel have contemporaneously described the role of the ALCA as being part of other duties as assigned or subsumed within the functions of other currently staffed full-time functional positions, which is not tenable given the scale and scope of the rulemaking.

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Further, such a compartmentalized process does not give industry confidence that any such guidance will be quickly obtained, allow contractors to rely on the advice given, or that the DoL will be accountable in any way to cooperate with this prime contractor request for advice. In our analysis of DoL capability to staff this new subcontractor advisory and assistance function, no such office currently exists to provide this service, nor has there been any analysis of the potential workload that would flow through such an office and whether it could meet the demands of prime contractors, some of whom manage subcontractors and suppliers that number in the tens of thousands. The current lack of clarity regarding protocols and precedents established under this rule establishes untenable risk for prime contractors, and subcontractors who wish to remain in the federal market, and must be addressed prior to making this rule final.

5. The guidance does not provide assurances of stability for contractors and unnecessarily raises risks for the federal market.

DoL should establish clear stability in the guidance they have issued underpinning this FAR proposal. We are concerned that the overreach outlined above could increase because guidance, like that issued by DOL, is not subject to rulemaking process. In fact, the DOL has already incorporated compliance under the recently released *Prohibition in Trafficking in Human Persons* regulation into the compliance scheme for this E.O. through a joint DoL/OMB Memorandum to executive agencies, despite the absence of reference to this regulation in the original E.O. Through interpretive memoranda such as this, DOL can change the guidance at any time, substantially increasing the already onerous compliance burden on contractors. This means prime contracts and subcontracts can in effect be changed unilaterally by the government without notice and comment, through the revision of the DoL guidance informing interpretation of the FAR clauses.

6. The complexity of supply chains makes flow-down of these requirements impractical.

Federal contractor supply chains on many major federal acquisition programs can be extremely complex and involve multiple tiers of subcontractors and suppliers. Even with a dollar threshold of \$500,000, a supply chain on a large prime contract may be several tiers deep. Imposing burdensome requirements such as this rule on every tier of subcontracts significantly adds administrative costs and potential for delay and disruption to the contracting process. In other rules, such as reporting of subcontracts under the Federal Funding and Taxpayer Accountability Act (FFATA) (See FAR 52.204-10), the government has recognized these problems and confined the reporting to first tier subcontracts only. We strongly recommend that the FAR Council and the DoL modify the rule and guidance to limit reporting of labor violations to first-tier subcontracts. In addition to lessening the administrative burden and attendant delay and disruption, confining the rule to first-tier subcontracts would lessen the burden on small businesses that are more likely to serve as prime contractors or first-tier subcontractors.

The FAR requirement that prime contractors mandate subcontractor reporting of labor law violations will be very costly, exceptionally onerous - if not impossible - for prime contractors to administer, and creates a number of unintended consequences related to prime and subcontractor relationships. Subcontractor reporting adds a significant level of complexity to the information collection and related review processes outlined in the rules. Prime contractors cannot, and should not, be tasked with

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ensuring the labor compliance of their subcontractors and their entire supply chain on a continual or ongoing basis, especially when non-compliance may be entirely unrelated to the federal contract under which the prime and subcontractor are partnered, or not applicable to the vast majority of the supplier's non-federal business.

This framework shifts the burden of labor law enforcement onto federal prime contractors by requiring them to perform a set of activities aimed at revealing subcontractor non-compliance and the procedural posture of their labor law violations, activity that is presently within the exclusive purview of the DoL. Prime contractors will be compelled to require ongoing information disclosures from their subcontractors, and then to engage in review and, potentially require corrective actions, with these subcontractors to remediate any “violations” under the framework. These activities will take a significant amount of time and may otherwise be outside the scope of any contractual agreement between a prime and supplier, even where the subject clause is required to be flowed down.

The fundamental nature of the buyer and seller relationship in the supply chain is defined by contract privity and has never envisioned a buyer being involved in resolving problems in the legal relationship between a seller/subcontractor and their employees and government enforcers. Unfortunately, that is what this rulemaking necessarily contemplates through its process for reviewing violations and/or negotiating resolutions or creating and monitoring binding LCAs to address issues flagged by the overbroad framework. Inserting a prime contractor into review and evaluation of internal labor matters of its subcontractors will almost certainly run afoul of privilege or, potentially, collective bargaining arrangements, between those subcontractors and their employees.

As discussed above, the advisory and assistance function provided by ALCA's for prime contractor labor law compliance remediation does not apply to subcontractor labor law non-compliance and the DoL then steps into the ALCA and CO's shoes to be the sole regulatory guide for how to manage the subcontractor responsibility process, should the prime contractor request it. The rationale for this bifurcation of the duty to provide advice to the prime about subcontractor remediation as limited to the DoL and not including the CO or ALCA (agency employees) is not explained in the rule. Industry is unclear why this construct was chosen, as it further complicates the process for the prime contractor, subcontractors and suppliers and the government.

These outstanding elements of subcontractor and supplier compliance must be addressed in advance of any effort to finalize this rule.

7. The rule requires disclosure of sensitive corporate information and does not adequately establish protocols to protect the required information to be collected.

Considering the sensitive and privileged nature of the information used in the investigation and enforcement processes of the labor laws involved in this rulemaking, it is reasonable to conclude that the process of higher tiered contractors being involved in any way in the disclosure of a labor law violations of contractors at other tiers in the supply chain or that require receipt and storage of subcontractor case files or legally protected documents will create enormous legal and third party liability and breach of contract risks for all parties. This will be true regardless of whether the ALCA and

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CO establishes robust prophylactic ways to shield information, properly manages the information flow and/or puts in place contractor firewalls to protect such information.

The rule requires the collection by prime contractors of labor law compliance data for 14 enumerated federal labor statutes and other regulatory requirements. To adequately address this concern, the rule should outline the steps to be taken by the contractor that is supplying the information to redact or remove identifying language from it, so as to mitigate additional opportunity for risk of exposure or breach.

Furthermore, for prime contractor information collection and reporting requirements, the agencies that receive such data should be required to ensure personally identifiable and business proprietary information is protected from disclosure when making violation information available either on a database visible to the federal contracting community or on a public website. The agencies should also seek comment from the provider of the documents regarding the scope of the documents that should be publicly disclosed. For example, issuance of OSH law violations may be the result of employee injuries. As such, personally identifiable information, such as the impacted employee’s name and his or her health information, may be contained on documents disclosed to the agencies by the contractor or subcontractor. The proposed rule and guidance are silent on the protection of personal information and should be revised to instruct agencies in how to protect this information from inadvertent disclosure and establish protocols and penalties for inappropriate or unauthorized disclosure of protected data.

The rule also proposes to have the prime contractor collect information from its suppliers regarding labor law compliance. Such information, particularly if it includes information about a purported or actual violation, is sensitive corporate information, yet the rule makes no mention of marking the data or establishing protocols for appropriately protecting and safeguarding the information. Such protections around personal and corporate information should be clearly established in the rule and provide a means for the provider of the information to redact certain types of information or require the agency receiving the information to establish protocols to ensure protection.

Preferably, as noted above, the DoL will realize that it is easier and far more efficient and cost-effective to aggregate their own data regarding corporate labor law compliance, thereby mitigating any risk from exposure. Such action to build a complete government capability to collect and store relevant data submitted by federal contractors is more viable than pursuing the construct in the rule whereby a duplicative process for collecting compliance data is established within the federal vendor community.

8. The monetary threshold for application of the rule is too low and should be raised.

The rule establishes a \$500,000 threshold for the requirement for subcontractors to report labor violations. This threshold is far too low. One of the stated purposes of the rule is to avoid burdens on small businesses, but small businesses routinely receive contracts and subcontracts of \$500,000. It is worth noting that dollar thresholds subject to five-year inflation adjustments that were once at \$500,000 are now set at higher amounts and are scheduled to be increased later this year. If the objective is truly to minimize the impact on small businesses and mitigate the burden this rule will have on subcontractors, industry recommends that after an appropriate phase-in period, the threshold

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should be \$1,000,000 as the lowest threshold, but also recommend scaling significantly higher as set forth in the industry recommendations below.

9. Recommendations from industry to mitigate the impact of the rule and guidance.

As stated above, there are numerous issues that the government must consider prior to issuing a final rule and guidance. In industry's opinion, many of these issues are not resolvable within the current proposed framework and thus the government should consider reworking its proposed approach to work within existing procurement processes in order to avoid imposing on contractors an inappropriate and costly compliance obligation which provides no added value. Should the government wish to proceed within this framework however, below are recommendations that industry believes will accomplish the requirements of the E.O. in a more efficient and functional manner.

a. Establish a single reporting portal for all contractors through SAM.

Many subcontractors sell products to many prime or higher tier contractors. Many subcontractors also sell directly to the government. Moreover, because reports must be updated every six months, presumably from the date of award of a covered contract or subcontract, if subcontractors do not have a single place to file reports, they will be in a constant state of filing new and updated reports with both the government and multiple prime contractors. Because the reporting burden of this regulation is so significant, the government should at a minimum provide a common place for reports to be filed. As stated above, industry believes that any reporting requirements under this rule are redundant to compliance information already in the possession of the DoL. If, however, a reporting requirement remains as part of this proposal, industry would recommend that this reporting should be made through the SAM system, which is already accessed and utilized in the contracting process. Such a requirement would aggregate the data into the existing tool familiar to the contracting community and would avoid the added expense of creating new databases and interfaces.

b. Contractors should be afforded the opportunity to establish compliance on a bi-annual basis.

Though the E.O. contemplates contractor labor violation reports every six months following contract award, for many larger contract holders with thousands of federal contracts, this could cause nearly continuous daily reporting. We would recommend that the burden for some contractors and the government could be alleviated by disconnecting the reporting requirements from each transaction and creating the ability to establish labor law compliance, for purposes of responsibility determinations for contract awards, on a bi-annual basis. The process could be done pre-award, in anticipation of competitions and the need to demonstrate compliance for a responsibility determination. The DOL and the FAR Council could select dates based on the calendar for reporting, (e.g., April 30 and October 30 to align with other contractor bi-annual reporting periods already established in statute and regulation) or require filing in conjunction with other required DOL reporting. Such a step would significantly reduce the reporting burden for both prime contractors and the government, as it would dramatically reduce the volume and frequency of initial and subsequent reporting. Such an option should also significantly

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alleviate the burden on the ALCAs and the COs, freeing them to rely upon a prior determinations instead of re-reviewing information for each individual procurement.

- c. Limit the reporting requirements to labor law violations in connection with the performance by the offeror of a federal contract.*

Such a limitation would be consistent with existing responsibility reporting requirements under the FAR (see FAR 52.209-5 and 52.209-7) and would also significantly reduce the volume of the reporting burden. It would also permit those entities that are conducting business in the federal market and best prepared to address government-unique requirements like those proposed in this rule and guidance.

- d. Shorten the period of coverage of the reporting requirements.*

Industry would suggest that the period of coverage should be reduced to 6 to 12 months in order to provide more manageability in the process and avoid a punitive action in contracting, as expressly proscribed in FAR Part 9.

- e. Provide exemptions for all commercial items at the prime and subcontract levels.*

As noted above, the government should sustain the intent of the legislative branch and exempt all commercial items, including those in subcontracting and supply contracts, from coverage under this rule. It was never the intent of the statutes to impose government-unique requirements on these items, which are essentially the same or very similar to those offered in the commercial market.

- f. Provide exemptions or create mechanisms for contingency, urgency or expedient needs or where the agency directs the prime contractor to a specific source and/or permit agency heads to waive the requirements of this rule to permit rapid acquisition as needed.*

Do not limit or abolish the current ability of CO's ability to contract with a non-responsible party under the compelling needs exception in FAR 9.4

The rule as drafted includes no exemptions for urgent and compelling situations and the government simply has too many urgent national security, homeland security or natural disaster emergencies to allow those mission needs to become mired in the bureaucratic process this proposal imposes on responsibility determinations. Such an inability to act quickly would place these missions at risk.

- g. Establish a means to “fast-track” low risk violations without activating the remedial process.*

Establish risk for labor law “violations” and permit CO discretion to move forward with a responsibility determination for matters that properly fit into the low risk categories. This means of mitigation of

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impact could be done in conjunction with the ALCA, but without the remedial process *having to be activated*.

- h. Prohibit retroactive application of any final policies through modification of existing contracts, including multiple year IDIQ contracts with less than 3 years remaining in the contract term, and do not make option invocation contingent on agreement to incorporation of the new policies or clauses.*
- i. Industry recommends consideration of a phased approach to implementation to make the burdens and costs more manageable for government and industry.*

Industry would propose consideration of a phased implementation and enforcement approach over at least 5 years that included the following elements:

- Year 1-2: Stand up the ALCA functions within each agency: Hire and/or appoint and train employees at every relevant agency and within the DoL to implement the rule and manage the oversight compliance process. This time frame also permits contractors to effectively assess the applicability of the new rules to their specific business model and offerings and begin to establish compliance and reporting protocols and mechanisms, and train their employees.
 - Year 3: Implement contractually in new solicitations and contracts valued over \$20,000,000 and apply the requirement to prime contractors only;
 - Year 4: Implement contractually in new solicitations and contracts valued over \$10,000,000 and apply the requirements to prime contractors only;
 - Year 5: Implement contractually in solicitations and contracts valued over \$5,000,000 and apply the requirements to prime contractors only;
 - Year 6: Implement the flow-down requirements to subcontractors;
 - At the end of the phase-in period, align the actionable threshold value with the contractual value.
- j. Address “blacklisting” concerns by establishing safe harbor frameworks for subcontractors and primes.*

The government should establish some form of safe harbor framework to provide subcontractors, found not to be responsible by prime contractors based on DoL or CO advice with the ability to remain competitive in the federal market after demonstrating appropriate remediation of concerns.

Another safe harbor should be established in the policy that includes protection for the prime contractor from contract or other civil liability that might otherwise be actionable by a subcontractor from a finding of non-responsibility.

After phasing in such a framework for subcontractors, the government should extend that safe harbor for prime contractors to rely on subcontractor labor law violation representations made in good faith.

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Conclusion

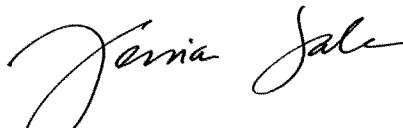
CODSIA members overwhelmingly agree with E.O. 13673 that the vast majority of federal contractors comply with labor law, but note that this proposed rule does not reflect that position. The DoL guidance and the FAR proposed rule would subject contractors and the government to significant risks, including increased costs and liability associated with managing this regulatory burden and delays in the contracting process. Rather than risking such liability and complying with burdensome and costly requirements of the rules, some companies – particularly non-traditional DoD suppliers and commercial-item vendors - will choose to exit the federal marketplace. The rules will also discourage new entrants from coming into the federal marketplace because of the significant business risks and extraordinary process and legally risky requirements not required in the commercial sector. The delays contemplated with this proposal will only serve to damage the government mission, particularly when there is a sense of urgency associated with the acquisition.

As set forth above, CODSIA strongly urges that the government withdraw both the guidance and proposed rule in order to communicate and coordinate with industry to establish a new paradigm for assessing labor law compliance in relation to government contracting.

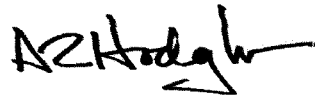
Respectfully,



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